84-2001

No.

Office Supreme Court, U.S.
FILED
JUN 24 1985
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALLISON C. COLLARD and JULIA A. COLLARD,

Petitioners,

— against —

THE INCORPORATED VILLAGE OF FLOWER HILL, THE BOARD OF TRUSTEES; WILLIAM R. HOWE, BUILDING INSPECTOR; HERBERT ASH, THOMAS J. WALSH, ROBERT S. CAINE, ALFRED E. RUNGE, and THE ZONING BOARD OF APPEALS OF THE INCORPORATED VILLAGE OF FLOWER HILL, and JOHN M. FARRELL, ESQ., VILLAGE ATTORNEY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

ALLISON C. COLLARD and JULIA A. COLLARD,

Petitioners

- against -

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Joseph R. McPhee, Jr.
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Question Presented

Whether this Court's decision in Migra v. Warren City School District Board of Education, 465 U.S. ____, 79 L.Ed. 2d 56 (1984) is applicable to bar a federal civil rights claim in federal court where;

(a) the plaintiffs on the same day, commenced both a federal civil rights suit in federal court and a parallel state court proceeding based solely on state law grounds;

(b) at the defendants' instance, the federal action was stayed under the abstention doctrine to allow the state law claims to be first determined;

(c) the plaintiffs never made in the state proceeding an express reservation of their federal claim for federal adjudication, but

rather, as England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964), states is also sufficient for purposes of reserving the plaintiffs' federal claims for federal adjudication, simply refrained from litigating their federal claim in the state proceeding (see 375 U.S. at 421);

(d) the defendants as well as the state court were aware of the plaintiffs' intention, should they not prevail in the state proceedings, of returning to federal court to secure an adjudication of their federal claim; and

(e) the state court ruled against the plaintiffs on the state law claim without ever mentioning, much less purporting to rule on plaintiffs' federal civil rights claim.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

ALLISON C. COLLARD, et al,
Petitioners

- v -

THE INCORPORATED VILLAGE OF FLOWER HILL, et al,

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioners Allison C. Collard and Julia A. Collard, plaintiffs below, respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 26, 1985.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, not yet reported, appears in the Appendix to this petition. The opinion of the United States District Court for the Eastern District of New York dated October 30, 1984, not yet reported, also appears in the Appendix.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on March 26, 1985. This petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

United States Constitution, Fourteenth Amendment, § 1:

> "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 42, Section 1983 (1979), in part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

United States Code, Title 28, Federal Rules of Civil Procedure, Rule 8(c), in part:

> "Affirmative Defenses. In a pleading to a preceeding pleading, a party shall set forth affirmatively ...res judicata ... and any other matter constituting an avoidance or affirmative defense."

United States Code, Title 28, Federal Rules of Civil Procedure, Rule 12(b)(6), in part:

> "How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion ... (6) failure to state a claim upon which relief can be granted..."

New York Civil Practice Law and Rules,

Article 78, in part:

"§ 7801 Nature of proceeding

Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article. Wherever in any statute reference is made to a writ or order of certiorari, mandamus or prohibition, such reference shall, so far as applicable, be deemed to refer to the proceeding authorized by this article. Except where otherwise provided by law, a proceeding under this article shall not be used to challenge a determination:

1. which is not final or can be adequately reviewed by appeals to a court or to some other body or officer or where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application unless the determination to be reviewed was made upon a rehearing, or a rehearing has been denied, or the time within which the petitioner can procure as rehearing has elapsed; or

2. which was made in a civil action or criminal matter unless it is an order summarily punishing a contempt committed in the presence of the court."

"§ 7802 Parties

(a) Definition of "body or officer". The expression "body or officer" includes every court, tribunal, board, corporation, officer, or other person, or aggregation of persons, whose action may be affected by a proceeding under this article.

(b) Persons whose terms of office have expired; successors. Whenever necessary to accomplish substantial justice, a proceeding under this article may be maintained against an officer exercising judicial or quasi-judicial functions, or member of a body whose term of office has expired. Any party may join the successor of such officer or member of a body or other person having custody of the record of proceedingsd under review.

(c) Prohibition in favor of another. Where the proceeding is brought to restrain a body or officer from proceeding without or in excess of jurisdiction in favor of another, the latter shall be joined as a party.

(d) Other interested persons. The court may direct that notice of the proceeding be given to any person. It may allow other interested persons to intervene."

"§ 7803 Questions raised

The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or

2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or

3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence."

Statement of the Case

A. Preliminary Statement of Facts

This is a petition for a writ of certiorari by the Plaintiffs, the owners of real property located in the Village of Flower Hill, Nassau County, New York, from a judgment of the United States Court of Appeals for the Second Circuit (per curiam), entered March 26, 1985, on appeal from a Decision and Order of the United States District Court for the Eastern District of New York (Mishler, J.), entered October 30, 1984, said Decision and Order having dismissed, on the grounds of res judicata and collateral estoppel, the Plaintiff's federal civil rights complaint brought pursuant to 42 U.S.C. § 1983 against respondents herein.

The Respondents, Defendants below, are the Incorporated Village of Flower Hill ("the Village"), its Board of Trustees, and its Board of Zoning Appeals, the Village's Building Inspector (William R. Howe), certain members of its Zoning Board of Appeals (Thomas J. Walsh, Robert S. Caine, Herbert Ash and Alfred E. Runge), and the attorney for the Village (John M. Farrell, Jr.).

The Petitioners, Plaintiffs below, are husband and wife owners of commercial property situated on Northern Boulevard, Roslyn (Flower Hill), Nassau County, New York. In seeking to enlarge their property with a separate building located adjacent to their present building, Petitioners submitted to the Village, a plan that conformed to the Village Zoning Code

and the covenant on the land. The Village responded by rotating Petitioners' rear and side yards from their traditional boundaries and held that Petitioner's plan now required a variance. Petitioners then submitted a second plan that fully conformed with the newly-defined rear and side yards. The Village replied by voting to rezone Petitioner's commercially zoned lot to "residential." Petitioners were forced to withdraw their building plans and to take an appeal of their first plan to the Zoning Board of Appeals on the issue of the newly-defined rear and side yards. When the Village published the notice of hearing of the Board of Appeals, the village attorney added a new zoning restriction, namely, that Petitioners could not build a second

building on their lot without also seeking a variance.

From facts provided in the concurring and dissenting opinions of the Zoning Board of Appeals (Appendix, A-67 to A-102) and developed during the Petitioners' contacts and writings with Village officials before the Zoning Board hearing, it became evident that Village officials together with the Village Attorney and Building Inspector, conspired to destroy and obstruct Petitioners' attempts to build on their property even pursuant to a plan which met all of existing Zoning Code requiremeants.

B. State Court Proceedings

On July 21, 1982, Petitioners filed a petition in the Supreme Court of the State of New York, Nassau

County, a petition pursuant to Article 78 of the New York Civil Practice Law and Rules alleging that the Village had been arbitrary, capricious and unreasonable in its dealings with Petitioners. An Article 78 special proceeding brought under New York law seeks a determination on the propriety of the actions and scope of authority of a public body or officer.

The Article 78 did not raise any constitutional issues but merely requested a review as to the reasonableness of the Board's findings. In its opinion, (A-44 to A-66), the state court determined that "the function of the court is nonetheless a limited one" (A-54) and looked only as to whether there was a rational basis, supported by substantial evidence as to whether the

Village made a proper interpretation of the applicable law. The state court concluded that the Board's interpretation of the local law was "rationally based" but refused to consider the reasonableness of their redefining Petitioners' rear and side yards. The decision of the New York Supreme Court later withstood appeal. See, Collard v. Runge, No. 14312/82 (N.Y. Sup. Ct., Nassau Cty., 11/9/82), aff'd without opinion, No. 1183E (App. Div. 2d Dept., 1/9/84), appeal den. No. 490 (N.Y. Ct. of App., 6/19/84).

C. Federal Court Proceedings

Petitioners filed their federal civil right action, under 42 U.S.C. § 1983, on July 21, 1982, the same day that their Article 78 petition to

review the actions of the Village was filed in the state court.

On October 26, 1982, Respondents filed a motion, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, seeking a dismissal or a stay of Petitioner's § 1983 action pending the outcome of Petitioner's Article 78 proceeding filed simultaneously in state court. The basis of Respondent's Rule 12 (b)(6) motion was neither res judicata nor collateral estoppel - it couldn't have been since the proceedings in the New York courts were not concluded until some 20 months later!

On December 10, 1982, the District Court (opinion per Mishler, J.), while refusing to state that it was applying the abstention doctrine, see, Railroad Commission v. Pullman Co., 312 U.S. 496

(1941), issued, instead, what it called a "stay [of] this action pending a final decision in state court." (Appendix, A-5 to A-10) The stated and limited purpose of the stay was to permit local governmental authorities and the state courts to conduct an "orderly review" of the Zoning Board's actions and to interpret the applicable zoning regulations. By "staying" Petitioners federal claim as it did, the District Court expressly retained jurisdiction with the expectation that upon conclusion of the state court proceedings, in which matters of local law would be resolved, the stay of Petitioner's federal claim would be lifted and Petitioner's federal action allowed to proceed forward in the District Court.

The reservation of Petitioner's federal civil rights claim for the federal forum was clear in view of the District Court's limited purpose for staying the proceedings and its retention of jurisdiction. It must be seen as equally evident that Petitioners were not to raise their federal claim in the state proceeding since all parties and both the federal and state courts were fully aware of the District Court's stay and the reasons for it.

The New York court proceedings were concluded on June 29, 1984, with the denial of a request by Petitioners for a hearing before the Court of Appeals of New York to review the lower state courts' decisions. Shortly thereafter, Petitioners filed

an amended complaint and requested that the stay of the federal proceedings be lifted and that discovery proceed. The Respondents, however, moved for outright dismissal of Petitioner's complaint at this time, on the new grounds of collateral estoppel and res judicata notwithstanding their acquiescence in the District Court's stay and retention of jurisdiction some two years earlier. On October 30, 1984, District Judge Mishler denied Petitioners' request that the stay be lifted and, instead, granted Respondents' motion to dismiss on the aforesaid grounds. (Appendix, pages A-11 to A-43, pursuant to this Court's recent decision in Migra v. Warren City School District, Bd. of

Education, 465 U.S. _____, 104 S. Ct. 892 (1984).

The District Court reasoned, in essence, that Petitioners could have brought their federal civil rights claim in their Article 78 proceeding under New York law and, therefore, should have notwithstanding the District Court's stated purpose for issuing its stay and retaining jurisdiction, i.e., to allow the state courts to interpret the local law. The District Court cited Migra as holding that New York preclusion law would prevent re-litigation of Petitioner's Article 78 proceeding in the New York state courts and should therefore have the same preclusive effect in federal court with regard to Petitioner's § 1983 federal civil rights claim which was expressly

stayed, with the intent to resume, upon completion of the state court proceedings.

On November 28, 1984, Petitioners filed a Notice of Appeal in the District Court to have the case reviewed by the United States Court of Appeals for the Second Circuit. Briefs were submitted and oral arguments heard on March 21, 1985.

The Petitioners sought reversal by the Second Circuit on the grounds, inter alia, that the District Court had misapplied Migra by adopting its holding in a case where the Defendants below had requested and received a stay with the retention of federal jurisdiction and that the Defendants therefore acquiescenced in Petitioners' choice and reservation of a federal forum for their federal claim.

The Defendants, hence, could not be heard to complain about the resumption of Petitioner's federal claim in the federal court following the state proceedings in which all sides agree that Petitioners §1983 federal claim was never litigated.

Petitioners also argued that the District Court committed error when it dismissed their action on the ground of collateral estoppel since application of this doctrine requires that the issue sought to be precluded from relitigation had to have been actually litigated in the prior proceeding. Parklane Hosiery Company, Inc. v. Shore, 439 U.S. 322 (1979).

In a per curiam decision entered on March 26, 1985, the United States Court of Appeals for the Second Circuit affirmed the dismissal of

Petitioner's federal civil rights claim. In doing so, the U. S. Court of Appeals expressly adopted the District Court's erroneous application of Migra to the situation in which the District Court issued a stay for the express purpose of having the state courts rule on matters of local law before the intended resumption of a claim brought by a federal plaintiff. (A-5 to A-10)

Reasons for Granting the Writ

The Decision Below Misapplies the Holding of Migra v. Warren City School District Board of Education, 465 U.S. ____, 104 S.Ct. 892, 79 L.Ed. 2d 56 (1984), and Ignores This Court's Express Teaching That the Reservation of Federal Claims Need Not be Explicit

The abstention doctrine is a form of respect shown on the part of the federal judiciary to the states'

courts under our system of federalism. In Railroad Commission v. Pullman Co., 312 U.S. 496 (1941), this Court indicated that where state law is uncertain the district court should, at least temporarily, refrain from exercising its jurisdiction and, instead, require that a suit be brought in state court to resolve the uncertain state law issues. Upon receiving an interpretation of state law rendered by the appropriate state court, the federal court would resume the exercise of its jurisdiction barring the federal issues being rendered moot as a result of the interpretation of state law by the state court, Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976); County of Alleghany v. Frank Mashuda Co., 360 U.S. 185 (1959), or the federal

plaintiff's ultimately deciding to litigate his federal claim in the state proceeding, England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964). Abstention is generally invoked to avoid the unnecessary adjudication of federal constitutional issues, see, e.g., Martin v. Creasy, 360 U.S. 219 (1959); Shipman v. DuPre, 339 U.S. 321 (1950).

By issuing a stay with the retention of jurisdiction in order to permit the state courts, in the instant litigation, to conduct a review of local law, the District Court effectively invoked the abstention doctrine notwithstanding the fact that the District Judge refused to call the "stay" an "abstention."

By sending Petitioners entirely through the state courts before they

would be permitted to resume their federal action, the District Court fell within the second of three general categories where this Court has held abstention of the exercise of proper federal jurisdiction to be appropriate, Colorado River Water Conservation District v. United States, supra at 814. This Court restated in Colorado River, citing Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959), that:

> "[a]bstention is...appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar."

Colorado River Water Conservation District v. United States, supra at 814.

In the case at bar, the District Court stated when issuing its stay that:

> "We decline to interfere here with the orderly review in the state courts of the Board's actions and interpretations of zoning regulations ... Such stay is based upon notions of comity in the uniquely local matter as well as a policy of avoiding wasteful duplication of judicial resources." [Emphasis added]

Appendix, A-9, A-10.

The "stay" issued by the District Court is identical in both effect and purpose to the second situation outlined in Colorado River as appropriate for abstention. It should therefore be treated as an instance of abstention from jurisdiction by the District Court.

By contrast, this Court's decision in Migra v. Warren City School District Board of Education, 465 U.S. , 104 S.Ct. 892, 79 L.Ed.2d 56 (1984), dealt with a federal plaintiff who commenced her civil rights action

only after all proceedings in the Ohio state courts were completed and final. The plaintiff did not seek to exercise her right to have a federal forum to determine her federal claims either prior to or simultaneously with the commencement of her related Ohio state court action. In Migra, this Court held that the federal courts must accord the prior state court judgment the same preclusive effect that the state courts which rendered the decision would have had the federal plaintiff, subsequent to the completion of its initial state court action, attempted to then bring its federal claim in the state courts.

The Migra decision presented a situation where the abstention doctrine was neither applied nor could have been applied since there the federal

cause was commenced only after the state cause was ultimately concluded.

In holding in the instant case that Migra barred Petitioners' return to federal court to resume their federal suit, the courts below ignored the critical facts that here the Petitioners'would have had a federal adjudication of their federal claim but for application of the abstention doctrine and that petitioners sufficiently reserved their federal claim for federal adjudication. Moreover, the Court of Appeals altogether ignored the abstention doctrine aspect of this case by describing Petitioners' federal action as a "subsequent 1983 suit" (A-4)-- after previously recognizing that Petitioners' filed both suits on the same day in 1981 (A-3).

In so treating Petitioners' federal claim, the courts below ignored both the meaning and consequences of abstention and the import of Migra. Migra could not have been meant to be applied to a case where the federal action was already pending along with the state action and the plaintiff was prevented from securing a federal court determination solely by reason of application of the abstention doctrine.

This Court stated in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 416 (1964) that abstention does not involve abdication of federal jurisdiction, but only the postponement of its exercise. The Court went on to hold that a litigant foregoes his right under the abstention doctrine to return to the

federal district court for determination of his federal claims only by freely and without reservation submitting his claims to the state courts for decision. Id. at 419. The Court indicated that this reservation may be express, which should in any event protect the plaintiff's right to return to federal court. However, the England Court further stated;

> "Such an explicit reservation is not indispensable; the litigant is in no event to be denied his right to return to the District Court unless it clearly appears that he voluntarily did more than Windsor required and fully litigated his federal claims in the state courts." Id. at 421

In the instant litigation, the issue is not whether Petitioners litigated their federal claim in state court -- all agree that they didn't -- but, rather, whether they will now be

precluded from litigating it for the first time in federal court because of a misapplication of Migra by the courts below. Plainly, what has occurred here is not only a misapplication of Migra, as well as the ignoring of a critial aspect of this Court's England opinion, but also a gross injustice. Here, all parties were fully aware of the pending federal action since the stay was issued upon Respondents' motion. As a result, Petitioners were not expected to raise their federal civil rights claim in the state court proceeding, but expected to return to the federal court to continue their federal claim. However, when they did return to federal court, the courts below entirely ignored the abstention aspects of this case and, instead, mistakenly treated

Petitioners' federal suit as if it had only been commenced subsequent to the conclusion of the state proceeding. This was clear error calling for reversal by this Court.

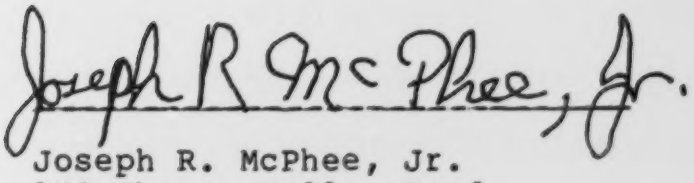
What has occurred in this case illustrates vividly the need for this Court to make clear to the lower federal courts, as well as to litigants, just how and under what circumstances the doctrine of claim preclusion may beve application where the abstention doctrine is applied. Surely, as the England opinion itself so well illustrates, the abstention doctrine was not intended to be a trap for the unwary. And correspondingly, there is nothing in Migra which indicates that that decision was intended to, in any way, overrule or limit England. None-

theless, here two federal courts have misread Migra as in effect partially overruling England and, in addition, have made federal abstention the trap for the unwary that England says it is not, and should not be.

III. CONCLUSION

For the foregoing reasons, this petition forwrit of certiorari should be granted.

Respectfully submitted,



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Dated: June 21, 1985

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 861 — August Term, 1984

(Argued: March 21, 1985 Decided: March 26, 1985)

Docket No. 84-7996

ALLISON C. COLLARD and JULIA A. COLLARD,
Plaintiffs-Appellants,

—against—

THE INCORPORATED VILLAGE OF FLOWER HILL, THE BOARD OF TRUSTEES; WILLIAM R. HOWE, BUILDING INSPECTOR; HERBERT ASH; THOMAS J. WALSH, ROBERT S. CAINE, ALFRED E. RUNGE, and THE ZONING BOARD OF APPEALS OF THE INCORPORATED VILLAGE OF FLOWER HILL, and JOHN M. FARRELL, ESQ., VILLAGE ATTORNEY,
Defendants-Appellees.

Before:

KAUFMAN and MESKILL, *Circuit Judges*, and MACMAHON,* *District Judge.*

Allison and Julia Collard appeal from a judgment of the United States District Court for the Eastern District of New York (Jacob Mishler, *Judge*), dismissing their

* The Honorable Lloyd F. MacMahon, United States District Judge for the Southern District of New York, sitting by designation.

complaint, which alleged violations of 42 U.S.C. § 1983 (1982).

Affirmed.

JOSEPH P. HOEY, Mineola, N.Y. (Suozzi, English & Klein, P.C., Mineola, N.Y., Lois Carter Schlissel, Kenneth L. Gartner, *of counsel*) *for Appellees.*

JOSEPH R. MCPHEE, Roslyn, N.Y. (Collard, Roe & Galgano, P.C., Roslyn, N.Y., Thomas M. Galgano, Allison C. Collard, *of counsel*) *for Appellants.*

PER CURIAM:

Appellants are owners in fee of a parcel of real property located in the Incorporated Village of Flower Hill, New York. Their predecessor in title had executed and recorded a convenant, which provided that no building situated on the property would be enlarged without the prior consent of the Board of Trustees of the Village. In 1978, appellants petitioned the Board for its consent to enlarge the existing structure. When the petition was denied, they brought an Article 78 proceeding against the Village in New York State Supreme Court. The complaint was dismissed by order of the Appellate Division, *see Collard* v. *Incorporated Village of Flower Hill*, 75 A.D. 2d 631, 427 N.Y.S.2d 301 (1980). The New York Court of Appeals affirmed, *see* 52 N.Y.2d 594, 439 N.Y.S.2d 326 (1981).

Having failed in their attempt to enlarge the existing structure, appellants next sought to erect a building adja-

cent to it. They submitted a formal plan to the Village building inspector, who determined that it failed to conform to the Village building code, and informed them that they would need a zoning variance to construct the building as planned. Their application for a variance was denied by the Nassau County Planning Commission, and the denial was sustained by the Zoning Board of Appeals of the Village of Flower Hill.

On July 21, 1982, appellants filed two lawsuits. First, they petitioned the Nassau County Supreme Court, pursuant to Article 78, for a review of the Zoning Board's determination, arguing that it was reached arbitrarily and capriciously, and amounted to an unlawful confiscation of their property. On the same date, they filed this action in the U.S. District Court for the Eastern District of New York, claiming that the Board violated their civil rights, pursuant to 42 U.S.C. § 1983, by denying a permit to construct a second building on their property. Defendants in the federal action moved to dismiss or, alternatively, to stay the proceedings pending determination of the action in the state courts. Judge Mishler chose the latter course.

On November 9, 1982, the state Supreme Court sustained the Zoning Board's determination. That decision was affirmed by the Appellate Division, and leave to appeal to the New York Court of Appeals was denied. *See Collard* v. *Runge*, No. 14312/82 (N.Y. Sup. Ct. Nassau Cty. Nov. 9, 1982), *aff'd without opinion*, No. 1183E (App. Div. 2d Dep't Jan. 9, 1984), *appeal denied*, No. 490 (N.Y. Ct. App. June 29, 1984).

The state action having been decided with finality, the district court once again took the Village's motion to

dismiss under consideration. In a careful opinion, Judge Mishler granted the motion, and ordered the claim dismissed under the doctrines of *res judicata* and collateral estoppel in light of the previous state litigation. *See* — F. Supp. — (E.D.N.Y. 1984).

We agree with and adopt the district court's thorough and well-reasoned discussion of the preclusive effect of a prior state judgment on a subsequent § 1983 suit brought pursuant to 42 U.S.C. § 1983 in a federal court. On the authority of *Migra* v. *Warren City School Dist.*, — U.S. —, 104 S. Ct. 892 (1984), Judge Mishler properly held that a district court is precluded from hearing a claim that could have been but was not raised in a state court proceeding, if the courts of that state would be precluded from hearing that claim. Furthermore, we agree that, under New York law, the constitutional claims that form the gravamen of the district court action could have been brought in the earlier state proceeding, *see Kovarsky* v. *Housing Development Admin.*, 31 N.Y.2d 184 (1982), and that the New York law of claim preclusion would bar the subsequent claims had they been brought in state court following the unsuccessful Article 78 proceeding, *see O'Brian* v. *City of Syracuse*, 54 N.Y.2d 353 (1981); *Matter of Reilly* v. *Reid*, 45 N.Y.2d 24 (1978). Therefore, *Migra* dictates that the claim be precluded in a federal court as well.

We have carefully considered the Collards' numerous arguments on appeal, and find them to be without merit. Accordingly, for substantially the reasons set forth in the opinion below, the judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

ALLISON C. COLLARD and JULIA A. COLLARD,

Plaintiffs

- against -

THE INCORPORATED VILLAGE OF FLOWER HILL, THE BOARD OF TRUSTEES; WILLIAM R. HOWE, BUILDING INSPECTOR; HERBERT ASH, THOMAS J. WALSH, ROBERT S. CAINE, ALFRED E. RUNGE, and THE ZONING BOARD OF APPEALS OF THE INCORPORATED VILLAGE OF FLOWER HILL, and JOHN M. FARRELL, ESQ., VILLAGE ATTORNEY.

Defendants

----------X

CV 82-2143

MEMORANDUM OF DECISION AND ORDER

December 10, 1982

A P P E A R A N C E S :

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Joseph P. Hoey, Esq., Of Counsel
Harold Ickes, Esq., Of Counsel

MISHLER, District Judge

Plaintiffs seek to make certain improvements to property[1] owned by them and located within the Incorporated Village of Flower Hill (the "Village"), in Nassau County, New York. Defendants are the Village, the Board of Trustees of the Village (the "Board") and named individual members of the Board, the Zoning Board of Appeals of the Village and the Village Attorney. This action is one in a series of court challenges brought by plaintiffs concerning defendants' enforcement or impositions of restrictions on the subject property. Plaintiffs' instant action is brought pursuant to 42 U.S.C. § 1983 seeking money damages and declaratory relief granting plaintiffs the right to construct the proposed improvement.

Defendants bring this motion to dismiss the action herein on the grounds, inter alia, of res judicata and comity with reference to plaintiffs' litigation elsewhere. Defendants argue that the decision of the New York Court of Appeals in Collard v. Incorporated Village of Flower Hill, 52 N.Y. 2d 594 (1981) serves to bar relitigation here of plaintiffs' first cause of action and that we are required to abstain from or stay our disposition of plaintiffs' second cause of action in deference to the pending Article 78 action brought by plaintiffs in Supreme Court, State of New York, for the County of Nassau which raises the same issues that are now before us. For the reasons set forth below, we stay this action

pending a final decision in the suit currently before the state courts.

It is not necessary for the purposes of this decision to set forth the entire lengthy history of plaintiffs' attempts to enlarge the present building on their property or to erect a second building on the same parcel of land. Plaintiffs allege here that the Board illegally denied plaintiffs' request to alter and extend the existing building and that the Board illegally refused to grant a building permit to plaintiffs. Plaintiffs' Article 78 action and the action here concern defendants' conclusion that only one building may be built on Lots 9, 12 and 13 which together constitute one "lot," as the term "lot" was defined by the Board.

On November 9, 1982, Judge Stanley Harwood upheld such determination in the Article 78 action and also addressed the Board's interpretation of other terms, such as "rear lot" and "side lot" which are similarly relevant to our consideration of the issues here. This decision has not been reviewed by a higher state court at this date. Generally, issues of zoning and the regulation of land use are traditionally within the jurisdiction of local governmental authorities and the state courts. We decline to interfere here with the orderly review in the state courts of the Board's actions and interpretations of zoning regulations. While absention is discouraged in this circuit with

respect to civil rights actions brought pursuant to Section 1983, this court may, nonetheless, stay this action pending a final decision in state court. See Giulini v. Blessing, 654 F.2d 190 (2d Cir. 1981). Such stay is based upon notions of comity in this uniquely local matter as well as a policy of avoiding wasteful duplication of judicial resources.

Accordingly, we do not now address defendants' motion to dismiss. We stay this action for all purposes, pending a final judgment in the state courts, and it is

SO ORDERED.

_____

U. S. D. J.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

ALLISON C. COLLARD and JULIA A. COLLARD,

Plaintiffs

- against -

THE INCORPORATED VILLAGE OF FLOWER HILL, THE BOARD OF TRUSTEES; WILLIAM R. HOWE, BUILDING INSPECTOR; HERBERT ASH, THOMAS J. WALSH, ROBERT S. CAINE, ALFRED E. RUNGE, and THE ZONING BOARD OF APPEALS OF THE INCORPORATED VILLAGE OF FLOWER HILL, and JOHN M. FARRELL, ESQ., VILLAGE ATTORNEY.

Defendants

----------X

CV 82-2143

MEMORANDUM OF DECISION AND ORDER

October 30, 1984

A P P E A R A N C E S :

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MISHLER, District Judge

Defendants move to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(1) (lack of jurisdiction over the subject matter) and 12(b)(6) (failure to state a claim upon which relief can be granted).

HISTORY

Plaintiffs are the owners of the fee of real property located at the intersection of Northern Boulevard, Ridge Drive West and Ridge Drive East in the Incorporated Village of Flower Hill. Plaintiffs purchased the property in 1977. It consists of 28,000 square feet on which is erected a two-story office building occupying approximately 2,300 square feet.

Prior to 1966, the then vacant property was zoned Residential B-2 District which limited the use to a single family detached house on a lot having a minimum area of 7,500 square feet. The property consisted of three lots, i.e., lots 9, 12 and 13. In 1966, the Board of Trustees granted the then owners' application to have lots 9 and 13 rezoned from the use of single family residence to a General Municipal and Public Purposes District which permitted the property to be used as a sanitarium with accessory doctors' offices. As a condition to granting the application, the owner executed a covenant restricting the use of lots 9 and 13 as provided in the rezoning. The sanitarium was constructed, but the operators found

the use of the property as a sanitarium unprofitable. A further application was made in 1976 requesting a rezoning into a Business District. As part of the application, lot 12 was included in the request. The application was granted. As a condition the owner was required to execute a covenant restricting the entire plot, lots 9, 12 and 13, to certain professional type uses, i.e., medicine, dentistry, law, engineering, architecture or accounting, and limiting the number of tenancies. It further required that all alterations and extensions to the existing building be approved by the Board of Trustees. Such a covenant was executed by the owner and recorded in the Office of the Clerk of Nassau

County as a restriction on the use of the property running with the land. The covenants recited that the property was "zoned as part of the Business District of the Village in accordance with the provisions of Chapter 86, Section 86-12 of the Code of the Village of Flower Hill." It limited changes to the existing buildings as follows:

> No building or structure situated on the subject premises on the date of the Declaration of Covenants will be altered, extended, rebuilt, renovated or enlarged without the prior consent of the Board of Trustees of the Village.

In December, 1978, plaintiffs petitioned the Board of Trustees for its consent to alter and enlarge the

existing building. The application was denied on or about January 12, 1979. Plaintiffs commenced an action in the Nassau County Supreme Court against the Village of Flower Hill in April, 1979.

The complaint claimed that the Board's action "deprived plaintiffs of an authorized use of the premises" (State Comp. Par. 7) and that the Board's action was "unconstitutional and confiscatory and violates the Constitution of the State of New York and [the] Constitution of the United States, which in substance forbids actions by Government authorities depriving any person of property without due process of law" (State Comp. Par. 8). The complaint was

dismissed by order of the Appellate Division of the Supreme Court for the Second Judicial Department for failure to state a cause of action. Collard v. Incorporated Village of Flower Hill, 75 A.D. 2d 631, 427 N.Y.S. 2d 301 (1980). The Court of Appeals affirmed, 52 N.Y. 2d 594, 439 N.Y.S. 2d 326 (1981).

Plaintiffs thereafter submitted a site plan to the Building Inspector of the Village of Flower Hill proposing the erection of a new building to the rear of the existing building on lot 12. The Building Inspector denied the application on the ground that it failed to comply with section 86-12 of the Village Code in the minimum rear yard requirement, pointing out that

under section 86-12 of the Code, lot 12 was the rear yard of the existing building. Plaintiffs subsequently submitted a formal plan for the erection of a second office building on lot 12 on the same location as the proposed addition. They sought a variance from the rear yard requirement and height regulation. The proposed plan for the new office building consisted of five levels, each level having an area of approximately 2,690 square feet--a total of 13,450 square feet. The application was considered by the Nassau County Planning Commission.[1/] The Nassau County Planning Commission denied the application. The denial was sustained by the Zoning Board of Appeals of the Village of Flower Hill.

On July 21, 1982, plaintiffs petitioned the Nassau County Supreme Court for a review of the determination by the Zoning Board of Appeals. The petition claimed that "[t]he Board's denial of the application results in an unlawful confiscation of the Petitioners' property, since it cannot be used for the construction of a separate commercial building." (Plaintiffs' State Petition Par. 41).

On November 9, 1982, the Nassau County Supreme Court upheld the Zoning Board of Appeals' interpretation of the definition of lot and sustained the prohibition of more than one principal building per lot. Collard v. Runge, No. 14312/82 (N.Y. Sup. Ct.

Nassau Co. Nov. 9, 1982) (unpublished decision), aff'd without opinion, No. 1183E (App. Div. 2d Dep't Jan. 9, 1984), appeal denied, No. 490 (N.Y. Ct. App. June 29, 1984).

In the meantime, on July 21, 1981, plaintiffs filed a complaint in this court claiming their civil rights were violated by the unconstitutional and confiscatory action by the Board in denying consent to extend the existing building (first claim) and denying a permit for the construction of a second building on lot 12 (second claim). In the first claim, the complaint alleges a conspiracy between the Village of Flower Hill and John M. Farrell, Jr., attorney for the Board and the Village. The second claim

alleges a conspiracy among Farrell, William R. Howe (the Building Inspector) and the defendant members of the Zoning Board of Appeal who voted to sustain the determination of the Nassau County Planning Commission. Plaintiffs seek compensatory and punitive damages and a declaration "that the actions of the Board of Appeals . . . be [found] arbitrary, capricious and illegal and [to] grant plaintiffs the right to build the proposed building on their property." (Comp. p. 9). Defendants had moved to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b). All proceedings in this case were stayed pending review of the state court decision on appeal. Collard v. Incorporated Village of Flower Hill,

No. 82-2143 (E.D.N.Y. Dec. 10, 1982) (unpublished memorandum of decision and order). The state court order was affirmed by the Appellate Division of the Supreme Court, Second Judicial Department, by summary order, without opinion, entered January 9, 1984. The Court of Appeals denied leave to appeal on June 29, 1984.

This court, having withheld action on the original motion to dismiss, is now called upon to decide that motion.[2/] The defendants moved for such consideration. The plaintiffs moved to vacate the stay.

DISCUSSION

Res Judicata/Collateral Estoppel

The Supreme Court in United States v. Mendoza, ___ U.S. ___, 104 S. Ct.

568, 571 (1984), restated the preclusive effect of a prior adjudication on a subsequent action: "[O]nce a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation. Montana v. United States, 440 U.S. 147, 153, 99 S. Ct. 970, 973, 59 L.Ed.2d 210 (1979)."[3/] Quoting from Stendefer v. United States, 447 U.S. 10, 24, 100 S. Ct. 1999, 2008 (1980), the Court pointed to the reason for preclusion as follows: "[N]o significant harm flows from enforcing a rule that affords a litigant only one full and fair opportunity to litigate an issue, and . . . there is

no sound reason for burdening the courts with repetitive litigation." Id. at ___, 100 S. Ct. at 572.

The doctrine of collateral estoppel may be invoked where the issue of law or fact in the subsequent proceeding has been litigated and determined by a valid and final judgment. Wilson v. Steinhoff, 718 F.2d 550, 552 (2d Cir. 1983). It is not necessary that the parties be identical in both suits. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 99 S. Ct. 645 (1979) (permitting the use of offensive collateral estoppel). Court have construed 28 U.S.C. § 1738 so as to require federal courts to "give preclusive effect to state court judgments whenever the courts of the

state from which the judgments emerge would do so." Allen v. McCurry, 449 U.S. 90, 96, 101 S. Ct. 411, 415-16 (1980); Derish v. San Mateo-Burlingame Board of Realtors, 724 F.2d 1347, 1349 (9th Cir. 1983).

In Allen v. McCurry, supra, the Supreme Court held that "issues actually litigated in a state-court proceeding are entitled to the same preclusive effect in a subsequent federal § 1983 suit as they enjoy in the courts of the State where the judgment was rendered." Migra v. Warren City School District, ___ U.S. ___, 194 S. Ct. 892, 897 (1984) (emphasis added). The Allen decision, however, left open the question as to the preclusive effect of a state court

judgment concerning a federal issue that a § 1983 plaintiff could have raised but did not actually raise in the earlier state court proceeding. Allen v. McCurry, supra, at 97 n.10, 101 S. Ct. at 416 n.10. In so doing, the Second Circuit decision in Lombard v. Board of Education, 502 F.2d 631 (1974) (rejecting the application of res judicata in a § 1983 action where the federal constitutional claim was not actually litigated in the prior state court proceeding), cert. denied, 420 U.S. 976, 95, S. Ct. 1400 (1975), arguably retained its validity. But see Sachetti v. Blair, 536 F. Supp. 636, 640 (S.D.N.Y. 1982) (questioning whether Lombard is still good law after Allen v. McCurry and concluding that "at the very least, one must read

the Lombard holding narrowly, and should not expand it beyond its precise facts"). Thus, plaintiffs urge the court to accept the Lombard decision as controlling and argue that the constitutional issues raised in this present federal litigation were never actually litigated in either of the two prior state court proceedings. Defendants argue that Lombard was overruled by Allen v. McCurry, supra.

I reject plaintiffs' argument that Lombard is still good law and should apply to the case at bar. The recent Supreme Court decision in Migra v. Warren City School District, supra, at ___, 104 S. Ct. at 987, clearly confronted the issue previously left open by Allen v. McCurry. In so

doing, the Migra court rejected the Second Circuit's view espoused in Lombard that § 1983 prevents a state court judgment from having preclusive effect on constitutional issues raised in a subsequent federal proceeding which were not actually--although they could have been--raised in the state court proceeding. Migra v. Warren City School District, supra, at ___, 104 S. Ct. at 897-98. I further find, for reasons later discussed, that the issues in both claims were either actually litigated or could have been litigated in the prior state court proceedings and thus, those state court final judgments impose a claim-preclusive effect on the present litigation.

In the first state court action plaintiff argued that the Board's action in withholding its consent to extend the existing building was arbitrary and capricious.[4/] The New York Court of Appeals rejected the claim and held that the Board was not required to state the reasons for the rejection. Collard v. Incorporated Village of Flower Hill, supra, at 604, 439 N.Y.S. 2d at 331.

In the second action, the state court sustained Village of Flower Hill's interpretation of the term "lot" in Village Code § 86-1, and found the limitation of one principal building per lot as provided in Village Code § 86-12 reasonable. Collard v. Runge, supra.

The complaint before this court phrases the actions of the Village of Flower Hill in terms of constitutional violations. The first claim alleges that defendants' denial of plaintiffs' request for permission to alter and extend the existing building and defendants' failure to conduct a hearing on the request violated plaintiffs' right to procedural due process, and violated plaintiffs' right to substantive due process by "impairing the value of plaintiffs' commercial property without compensation." (Comp. Par. 16). The second claim charges a conspiracy (in which Farrell, the Village Attorney, is charged as prime mover) to redefine the definition of § 86-1 of the Village Code (Comp. Par. 23) and to

pass amendments to the Code to prevent the construction of a second building on lot 12 (Comp. Par. 25) which resulted in a "taking of Plaintiffs' property rights without just compensation, [and] the denial of Plaintiffs of due process." (Comp. Par. 29). Plaintiffs' complaint further alleges:

> That the denial of a variance is not justified in law; that the specious explanation of the board of Appeals for its denial involved an illegal and unreasonable interpretation of Village Laws, wherein definitions of laws were re-defined so as to deny Plaintiffs their rights to improve their property.

(Comp. Par. 30).

The conclusory allegations of conspiracy do not add substance to the

second claim. See Ellentuck v. Klein, 570 F.2d 414, 426 (2d Cir. 1978).

Identity of Issues

The application of the doctrine of res judicata or collateral estoppel does not require a showing that the issue in the prior action was framed in the same language or that the same theory of liability was charged as in the subsequent action. The basis of establishing an identity of issues is broader and more practical.

In O'Brien v. City of Syracuse, 54 N.Y. 2d 353, 445 N.Y.S. 2d 687 (1981), where a property owner failed to sustain a prior suit for de facto appropriation of his property, he was barred from relitigating that issue

where the theory of liability asserted in the second action was trespass. Similarly, a prior state court determination on a quasi contract claim bars relitigation in federal court "as to any cause of action arising from the same operative facts." RX Data Corp. v. Department of Social Services, 684 F.2d 192, 198 (2d Cir. 1982). Thus, since the subsequent claim (unfair competition) could have been presented in the prior action, that claim was barred in federal court. Id.

The court in Derish v. San Mateo-Burlingame Board of Realtors, supra, set forth helpful guidelines in determining the identity of issues. The court stated:

> To determine whether the Derishes' state and federal suits involve the same claim, we are assisted by asking:
>
> > (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arose out of the same transactional nucleus of facts.

Id. at 1349 (quoting Harris v. Jacobs, 621 F.2d 341, 343 (9th Cir. 1980)).

Since I find an affirmative answer to all four factors suggested in Derish, I conclude that the claims raised herein were either actually litigated or could have been litigated

in the prior state court actions. Therefore, the prior state court final judgments preclude relitigation of the issues.

Failure to State a § 1983 Claim

Alternatively, plaintiff has failed to state a § 1983 claim upon which relief can be granted and the claim should therefore be dismissed under Fed.R.Civ.P. 12(b)(6).

The procedural due process claim is frivolous. The New York Court of Appeals in Collard v. Incorporated Village of Flower Hill held that the Board was not required to give reasons for its denial. Collard v. Incorporated Village of Flower Hill, supra, at 604, 439 N.Y.S. 2d at 331.

It follows that a hearing was not required to determine the binding effect of the covenant or the interpretation of the consent clause for extending the existing building. No further discussion is necessary concerning the adequacy of the hearing on the request for permission to build a second principal building on log 12.

The substantive due process claim is expressed in the "taking without just compensation" allegation. This claim challenges the authority of the Village of Flower Hill in the manner in which it used its police power. Rogin v. Bensalem Township, 616 F.2d 680 (3rd Cir. 1980), cert. denied sub nom. Mark Garner Assoc., Inc. v. Bensalem Township, 450 U.S. 1029, 101

S. Ct. 1737 (1981), reviewed the history of zoning regulations under the police power of the state and the limitation on that power imposed by the Constitution.[5/] The Rogin court stated that zoning ordinances "are constitutional if they bear a 'substantial relationship to the public health, safety morals or general welfare.'" Id. at 688 (quoting Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395, 47 S. Ct. 114, 121 (1926))). The court reviewed the broad scope of the police power under the general welfare clause and quoted from Berman v. Parker, 348 U.S. 26, 33, 75 S. Ct. 98, 102-03 (1954), as follows:

> "The values it represents are spiritual as well as physical, aesthetic as well as monetary. It

> is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."

Robin v. Bensalem Township, supra, at 688.

In further defining the authority of a subdivision of a state to exercise its police power in restricting land use, the Rogin court quoted from Village of Belle Terre v. Bovaas, 416 U.S. 1, 8, 94 S. Ct. 1536, 1541 (1974), on what governmental purposes included, as follows:

> "A quite place where yards are wide, people are few, and motor vehicles are restricted are legitimate guidelines in a land-use project addressed to family needs. . . . The police power is not confined to

> elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet reclusion and clean air make the area a sanctuary for people."

Rogin v. Bensalem Township, supra, at 688 (citations omitted) (footnote omitted).

Plaintiffs do not allege that the zoning restrictions destroyed the value of their property. They claim a denial of the "right to use its property reasonably" (Comp. Par. 16(b)) and the impairment of the value of the property (Comp. Par. 16(c)) as a result of defendants' decision to refuse plaintiffs' request for "permission to alter and extend the existing building." (Comp. Par. 16).

The constitution does not protect a property owner's right to make more money than the zoning regulations permit, or a right to a fair market value of property at its highest and best use. See Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 98 S. Ct. 2646 (1978) (designation of Grand Central Station as a landmark, depriving Penn Central of the use for a high rise office building causing substantial individualized harm is not unconstitutional); Goldblatt v. Town of Hempstead, 369 U.S. 590, 82 S. Ct. 987 (1962) (an ordinance banning any excavation below the water table preventing plaintiff from continuing sand and gravel business he operated for 30 years is not unconstitutional).

Recently, the Second Circuit Court of Appeals in Park Avenue Tower Associates v. City of New York, No. 84-7128 (Oct. 12, 1984), in affirming a grant of summary judgment dismissing the complaint, stated that a "legion of cases . . . have upheld regulations which merely diminished the value of commercial property." Slip op. 6643.

The plaintiffs in the instant case do not complain of an ordinance that reduces the value of their property, but complain that the Village of Flower Hill refuses to grant their request under existing regulations that would have the effect, if granted, of increasing the value of their property. I find, however, regardless of this difference, that

plaintiffs' substantive due process claim is controlled by the foregoing decisions and should be dismissed under Fed.R.Civ.P. 12(b)(6).

Motion to Amend the Complaint

Plaintiffs move for leave to amend the complaint by adding a third claim. The claim alleges "purposeful discrimination" and a violation of plaintiffs' right to "equal protection of laws." The claim is based on the same operative facts litigated in the prior state court actions. A new theory based on the same facts does not avoid the preclusive effect of the prior judgments. The motion is denied.

ORDER

The complaint is dismissed. The Clerk is directed to enter judgment in

favor of defendants and against the plaintiffs dismissing the complaint.[6/]

SO ORDERED.

_____

U. S. D. J.

APPENDIX D
MEMORANDUM OF DECISION OF JUSTICE STANLEY HARWOOD

SUPREME COURT, NASSAU COUNTY, SPECIAL TERM/PART I
(9/13/82)
By: Stanley Harwood

ALLISON C. COLLARD AND JULIA A. COLLARD,
Petitioners,

for a Judgement pursuant to Article 78
of the Civil Practice Law and Rules,

- against -

ALFRED RUNGE, Chairman, HERBERT ASH,
JOHN WALTER, THOMAS J. WALSH and
ROBERT S. CAINE, Constituting the
BOARD OF APPEALS OF THE INCORPORATED
VILLAGE OF FLOWER HILL,

Respondents.

Dated: November 9, 1982 Index # 14312/82
Calendar No. 29

In this Article 78 proceeding petitioners challenge respondents' interpretation of various provisions of the zoning ordinance of the Village of Flower Hill. They also challenge the denial of their alternative request for variances of those zoning provisions. For the reasons stated below,

the determination of respondents must be sustained and the petition dismissed.

Petitioners are the owners of an irregularly shaped parcel of land in the business district of the Village of Flower Hill. The parcel, consisting of three tax lots (#9, #12 and #13) and totaling some 27,000 square feet, fronts on three public streets: Northern Boulevard which runs along the southern line of the property for 191 feet; Ridge Drive West, which runs in a northeasterly direction on the western line for 159 feet; and Ridge Drive East, which runs parallel to Northern Boulevard on the northern line for 153 feet. The easterly line has a length of 140 feet and abuts residentially zoned property. The

subject parcel is improved with a two-story crescent-shaped building which is used for professional offices. The building is situated on tax lots #9 and #13 (the westerly lots) in a "cate-cornered" fashion so that its northern wing is parallel to Ridge Drive East and its southern wing is parallel to the easterly line abutting the resi-dential district. The center wing faces the point where Northern Boule-vard and Ridge Drive West intersect. The address of the premises is North-ern Boulevard.

Prior to 1966, the parcel was zoned as a residential B-2 district. In that year, on application of the then owner, two of the tax lots (#9 and #13) were rezoned to the General Municipal & Public purposes district

so that the present structure could be built for use as a sanatorium and accessory doctors' offices. A Declaration of Covenants was entered into, recorded and filed, restricting use of the land to those purposes. In 1976, petitioners' predecessor in title applied for a second rezoning, this time for the entire property, including lot #12 which was then in and now abuts the residential zone, to the business district. The application was granted and a new Declaration of Covenants was entered into, recorded and filed, which released the property from the prior covenant but restricted it to specified professional uses. The Declaration also provided, inter alia, that the building could not be altered, renovated or enlarged without

the prior consent of the Village Board of Trustees. Petitioners subsequently purchased the property and in 1978 sought the consent of the Board of Trustees for purposes of adding a wing on to the building to be located on lot #12. Following a public hearing, the Board refused to consent, but declined to give reasons. Petitioners commenced litigation against the Village ultimately resulting in a Court of Appeals ruling that the refusal to give the consent required by the covenant was beyond court review unless petitioners could demonstrate bad faith. (See Collard v. Incorporated Village of Flower Hill, 52 N.Y.2d 594, 439 N.Y.S.2d 326.) The litigation was dismissed for failure to state a cause of action. (Id.)

In 1981, petitioners filed an application for a permit to construct a separate building to be located on lot #12, in approximately the same location as the previously proposed addition, but 10 feet to the east of the southern wing and 15 feet to the west of the easterly property line. By letters dated August 17, 1981 and October 29, 1981, the Building Inspector refused to issue the building permit maintaining that lot #12 was at least in part in the rear yard of the existing building, thus requiring, under the applicable sections of the zoning ordinance, a minimum set back of 25 feet from the easterly residential property line. The Building Inspector raised no objection to petitioners' proposal to put a second

building on the parcel. Petitioners, maintaining that lot #12 is a side yard for which only a 10 foot set back is required, filed an appeal with the respondent zoning Board requesting an interpretation of the definition of side and rear yards so that lot #12 was deemed to be a side yard. Petitioners sought, alternatively, a variance of the 25 foot rear yard set back requirement. Pursuant to Gen. Mun. Law § 239-m, petitioners' application was referred to the Nassau County Planning Commission which unanimously disapproved the proposal because of over-intensification of land use and the impact it would have on the neighboring residential district. Because of that disapproval, granting of the application by respon-

dent Board required approval by four of its five members, rather than the usual three. (See Gen. Mun. Law § 239-m.)

A public hearing was scheduled and pursuant to Village Law § 7-712(2)(c) public notices were served and published. In addition to the rear yard set back variance and a height variance no longer at issue, respondent Board pursuant to the powers given it by Village Law § 7-712(2)(c), gave notice that a variance of § 86-1 of the Code of the Village of Flower Hill was also required. That section, which sets forth the definition of terms used in the ordinance, defines "lot" as:

> "Any plot, piece or parcel of land on which is erected or is to be erected one (1) building and its

> accessory buildings, having the minimum area and the open spaces required by this chapter and such open spaces as are arranged and designed to be used in connection with such building."

The public hearing was adjourned and on March 25, 1982, petitioners filed an amended application for review which incorporated a request that the Board interpret the term "lot" so as to permit them to construct two principal buildings on the parcel. Petitioners did not request that the respondent Board treat tax lot #12 as a separate lot, nor do they do so here. In the event that interpretation was not adopted, petitioners sought a variance of the 'one principal building per lot' requirement.

On June 22, 1982, respondent Board rendered a decision upholding the

challenged interpretation of "lot" and "rear yard" and denying the requested variances, finding that petitioners had not demonstrated that compliance with the applicable zoning requirements would result in practical difficulties. (See Village Law §7-712; Fuhst v. Foley, 45 N.Y.2d 441, 410 N.Y.S.2d 56.) Two dissents were filed: one concluded that the interpretation of "lot" was erroneous, and held that petitioners were "entitled to a building permit for a separate office building meeting all the other requirements of Chapter 86 of the Code"; the other concluded that petitioners were being deprived of the reasonable use of their property by denial of the variances and further that rear and side yard were not properly defined. That

dissenting Board member also found that the Village, having "goofed" in its negotiations of the covenant by not specifically prohibiting construction of new buildings, was creating arbitrary and capricious "roadblocks" to thwart the petitioners. The majority opinion noted that the underlying reason for the application was to circumvent the restrictions of the covenant. This Article 78 proceeding ensued.

Although petitioners need not show 'bad faith' in this proceeding (cf. Collard v. Incorporated Village of Flower Hill, supra) in reviewing the determination of respondent Zoning Board, the function of the court is nonetheless a limited one. The determination must be sustained if it

has a rational basis and is supported by substantial evidence (Fuhst v. Foley, supra; see also Planning Board of Town of North Elba v. Zoning Board of Appeals of Town of North Elba, 79 A.D.2d 766, 434 N.Y.S.2d 784). Although petitioners focus much of their attention on the proper interpretation of "rear yard", the dispositive question here is whether petitioners are permitted, by the ordinance or a justifiable variance of it, to erect more than one principal building on a "lot". If they are not, whether the Building Inspector and the Board properly defined "rear yard" as it applied to this "lot" becomes irrelevant. This court concludes that the Board's determination not to permit the construction of a second building on one "lot" is

reasonable, and thus does not reach the issue of the proper construction of "rear yard".

Notwithstanding the clear and plain definition of "lot" contained in § 86-1 of the Code, petitioners assert that the respondent Board arbitrarily, capriciously and, indeed discriminatorily, applied the definition to their parcel, asserting that its size mandates another result. As evidence of arbitrariness and discrimination, petitioners point to three purported examples with the village where owners were permitted to erect more than one structure on a lot. One involved an application to the respondent Board for a variance and while the Board considered treating the parcel as one lot without discussion of the

application of § 86-1, the ultimate determination was to treat the parcel as two lots and grant a lot area variance, (see Matter of Flower Hill Automotive Sales, Inc., Village of Flower Hill Zoning Board of Appeals, November 19, 1980; see Cowan v. Kern, 41 N.Y.2d 591, 394 N.Y.S.2d 579), an alternative rejected by petitioners here. The Board found the other two examples to be pre-ecisting nonconforming uses, one of which partially involved accessory buildings. While the evidence before the Board on non-conforming use was somewhat thin, there was similarly scant evidence produced by the petitioner of the circumstances surrounding the issuance of building permits by the Building Inspector some 20 years ago. There is no assertion made that

the Board previously construed § 86-1, and the interpretation made here, a matter within the Board's discretion and entitled to great weight, must be upheld if rationally based. (Planning Board of Town of North Elba v. Zoning Board of Appeals of Town of North Elba, supra; Village Law § 7-712.)

In support of their assertion that the definition of "lot" was erroneously and irrationally construed to mean a parcel on which only one principal building shall be erected, petitioners rely on § 86-2 of the Code, entitled "word usage", which provides:

> Words used in the present tense include the future; the singular number includes the plural, and the plural, the singular; the word "lot" includes "plot"; the word "building" includes the word "structure"; and the word "shall" is always mandatory.

[Emphasis added.]

Based on that section, petitioners would rewrite the explicit definitional language of § 86-1 to include two, three or any number of buildings and their accessories, provided the "lot" as a whole is large enough so as not to violate the maximum lot coverage requirement of 40 percent. (See Code of the Village of Flower Hill, § 86-12(c).) Since, petitioners argue, the existing bulding and the proposed building together would comprise only 18 percent of the total parcel area, it is irrational to restrict petitioners to one building on the "lot". However, while petitioners are quite correct in asserting that the entire parcel of some 27,000 square feet is larger than the minimum lot area required by § 86-12(c) of the Code

(15,000 square feet), they ignore § 86-6 of the Code which provides in pertinent part that:

> No building lot shall be sold, divided or set off in such a manner that either portion sold, divided or set off, or the portion remaining shall:
>
> A. Be less than the minimum size prescribed by the regulations relating to the district in which it is situated.
>
> B. Fail to provide the yards or other open spaces required by the regulations relating to the district in which it is situated in respect to any building or use then existing.

****

The zoning ordinance was adopted for the "promotion of public health, safety, comfort, convenience and general welfare" (Code of the Village of Flower Hill § 86-29), and contains minimum requirements for lot size, yard area and open spaces for each of

its zoning districts in furtherance of that purpose. As the respondent Board noted in its decision, petitioners' proposed interpretation of "one" to be "more than one" by literal application of § 86-2 throughout the ordinance would result in chaos and absurdity. (See town of North Hempstead v. White, 1 Misc.2d 228, 144 N.Y.S.2d 358.) Moreover, it would thwart the purpose for which the zoning powers are granted (see Village § 7-700) by permitting an owner of a large parcel to crowd principal buildings together at will. Ironically, petitioners implicit argument is that, for purposes of the number of principal buildings permissible on the parcel it should, because of its size, be considered two lots, but for all other purposes it

should be considered one, evidently because of an inability to strictly comply with minimum lot and yard area requirements that would attach to a "second" lot. As petitioners, citing Rathkopf, The Law of Zoning & Planning, Vol. 2, at 34-25, point out:

> "The imposition of a minimum lot size requirement does not mean that a lot may not exceed the size; it may well be much greater. Until it is subdivided, however, it is usually considered to be one lot. If the lot is sufficiently large to be divided into two or more lots, each 'at least' the minimum size required by the ordinance, the landowner cannot be prevented from doing so."

Petitioners are in effect attempting to divide the parcel into two lots without demonstrating that each is at least the minimum size required by § 86-12(c).

The Board's interpretation that the ordinance prohibits more than one principal building per lot is neither irrational nor arbitrary. Petitioners are thus called upon to demonstrate that the property cannot reasonably be used or that petitioners will suffer significant economic injury, unless a variance on the ground of "practical difficulties" is granted. (National Merritt, Inc. v. Weist, 41 N.Y.2d 438, 393 N.Y.S.2d 379.) In support of their request for a variance petitioners offered that the taxes on lot #12 are $1,200 per year; no evidence was offered as to the taxes on the entire "lot" or its income. They also asserted that it is not desirable to enlarge the building because that would disturb the present tenants, an asser-

tion rejected by the Board in light of their previous application to do just that. While arguing that denial of the variance is tantamount to confiscation of lot #12, petitioners do not argue that they are denied reasonable economic benefit from the parcel as a whole, and they have submitted no plan or application for building on lot #12 as a separate lot. Petitioners again implicitly argue that the parcel should be simultaneously considered "one" and "more than one" lot but in the process have failed to demonstrate practical difficulties in adherence to the zoning ordinance. The determination denying petitioners' request for a variance so as to permit the construction of a second principal building on "one lot"

is rationally based and supported by substantial evidence.

Finally,, petitioners' contention, pleaded as a second cause of action, that the decision of the Board is untimely is without merit. The decision was rendered within 62 days of the hearing as set forth in Village Law § 7-712(2)(c).

See short form order signed herewith.

.....
J.S.C.

ORDER FROM WHICH APPEAL IS TAKEN
(ORDER OF JUSTICE STANLEY HARWOOD
DATED NOVEMBER 12, 1982.)

SUPREME COURT - STATE OF NEW YORK

Present: Hon. Stanley Harwood
SPECIAL TERM/PART I
NASSAU COUNTY

Index # 14312/1982
Motion Date: Sept. 13, 1982 Motion Cal. No. 29

ALLISON C. COLLARD AND JULIA A. COLLARD,
Petitioners,
for a Judgement pursuant to Article 78
of the Civil Practice Law and Rules,

- against -

ALFRED RUNGE, Chairman, HERBERT ASH,
JOHN WALTER, THOMAS J. WALSH and
ROBERT S. CAINE, Constituting the
BOARD OF APPEALS OF THE INCORPORATED
VILLAGE OF FLOWER HILL,

Respondents.

The determination of the respondents is sustained and the petition for a judgment pursuant to Article 78 of the CPLR annulling, vacating and setting aside the respondents' decision of June 22, 1982, is dismissed.

See memorandum decision filed herewith.

Dated: 11/12/82 Signed Stanley Harwood

APPENDIX

INCORPORATED VILLAGE OF FLOWER HILL:
BOARD OF APPEALS

----------X

In the Matter of the
Application of
ALLISON C. COLLARD
and JULIA C. COLLARD
for a variance of Section 86-12 of
building Zone
Ordinance of the
Village of Flower Hill.

DECISION

----------X

This is an application for a variance of Section 86-1 of the Code of the Village to enable applicants to construct an additional office building on premises known and designated as Section 6, Block 73, Lots 9, 2 and 13 on the Land and Tax Map of the County of Nassau, and of Section 86-12 (c) of the Code for a variance to reduce the rear yard setback from 25 feet to 15 feet.

After due notice by publication and mailing, a public hearing was held on March 3, 1982, adjourned to April 21, 1982, and concluded on May 26, 1982. The Nassau County Planning Commission recommended disapproval of this application.

The subject property fronts on three streets. Northern Boulevard (Route 25A), an east west state highway, abuts the southerly line for a distance of some 191 feet. Ridge Drive West runs in a northeasterly direction along the westerly line of the premises approximately 159 feet to a point where it intersects with Ridge Drive East. This latter street runs parallel with Northern Boulevard along the northerly line of the property a distance of about 153 feet. The

easterly line, which is perpendicular to Ridge Drive East and Northern Boulevard, has a length of 140 feet and separates the subject premises from improved residential property on the east. Single family residences are also across from the subject property on Ridge Drive East. The subject premises is improved with a two story concrete block building, built in three sgments, which is now used for office purposes. The center secton faces the intersection of Northern Boulevard and Ridge Drive West, and runs in a northwest southeast direction. One wing, which is parallel to Ridge Drive east, extends in a westerly direction from the northwesterly end of the center section, and the other wing, which is

parallel to the eastern line of the property, extends from the southeast corner of the center section in a southerly direction. The present building has a floor area of 2,260 square feet.

Applicant proposes to construct a rectangular two story and basement building 10 feet east of the existing building and 15 feet west of the easterly line having a floor area of 2,500 square feet.

An application for a building permit was denied on the ground that if the entire parcel is considered to be one lot, the proposed building violates Section 86-2 of the Code, which defines "lot" and states only one building can be built on a lot, and of Section 86-12 (c) of the Code

which requires a rear yard setback of 25 feet when the rear yard abuts a residential district. If, however, the plot on which the new building is to be built is considered as a separate lot, variances of the applicable side yard area, street frontage and building coverage requirements of the Section 86-12 of the Code are needed.

Applicant has elected to have the entire parcel considered one lot and has, accordingly, requested a variance of Section 86-1 of the Code to permit two principal buildings on one lot, and a variance of Section 86-12(c) of the Code to allow the new building to be built with a 15 foot rear yard setback, rather that 25 feet as is required by that section, as the rear

yard abuts property in a residential district.

Prior to 1966 the subject premises was in the Residential B-2 District in which single family detached houses on lots having a minimum area of 7,500 square feet were permitted. In that year the owner of the property applied to the Board of Trustees to have Lots 9 and 13 (the westerly lots) rezoned to the General Municipal and Public Purposes District, in order that a sanitarium with accessory doctors' offices could be built. That application was granted, and in conjunction therewith a Declaration of Covenants restricting the use of these purposes and encumbering Lots 9 and 13 was entered into and recorded.

In 1976 applicants' predecessor in title applied to the Board of Trustees for a change of zone to permit the entire property including Lot 12, the easterly lot, to be placed in the Business District because the property and existing building could no longer be used profitably for sanitarium and related purposes.

That application was granted and a new Declaration of Covenants restricting the property to certain professional type uses and a limited number of tenancies, as well as requiring all alterations or extensions to the existing building to be approved by the Board of Trustees, and covering the entire parcel was recorded and the old Declaration of Covenants was cancelled.

Applicants then purchased the property and soon thereafter applied to the Board of Trustees to construct an addition to the existing building on the property which was to be approximately the same size and in the same location as the proposed new building. This request was denied by the Board of Trustees, and its determination was upheld in the ensuing litigation brought by applicant - see Collard vs. The Village of Flower Hill, 52 N.Y. 2nd, 594 (1981).

Applicants maintain their need for a variance of Section 86-1 of the Code is necessary because connecting the present building to the proposed new building would disturb some of the existing tenants. It is noted,

however, that an extension to the existing building need not be along its eastern wall, for there is sufficient room on the westerly part of the lot to accommodate an addition the same size as the proposed building. Furthermore, applicants' proposal, when they applied to the Board of Trustees, pursuant to the provisions of the declaration of covenants for permission to extend the existing building, was to connect the addition to the present building along its entire easterly wall.

Applicants contend the Building Inspector incorrectly interpreted the definition of "lot" in Section 86-2 of the Code, and no variance of that section is needed. "Lot" is defined in Section 86-1 of the Code as:

> Any plot, piece or parcel of land on which is erected or is to be erected one (1) building and its accessory buildings, having the minimum area and the open spaces required by this chapter and such open spaces as are arranged and designed to be used in connection with such building."

Applicants argue that when the definition of "lot" in Section 86-1 of the Code refers to "lot" in the singular, the plural is also included, because Section 86-2 of the Code entitled "Word Usage" states "the singular number includes the plural, and the plural, the singular". Thus, when "one building" is specified it includes more than one building. Applicants' argument might be more credible if the definition of lot said merely "building" and did not specify "one (1) building". If applicants' approach is correct then anywhere the

Zoning Ordinance mentions "one", it also means more than "one", so if, for example, one offstreet parking space is required for each four seats in a restaurant, as provided in Section 86-12(D) of the Code, it also means that more than one parking space is required for that number of seats, and since Section 86-2 also states plural includes singular, if a 40 foot setback is designated, the setback need only be 1 foot. Mur. Justice Howard Hogan explained the fallacy of appellants' contention in Town of North Hempstead vs. White, 1 Misc. 2nd 228, 144, N.Y.S. 2nd, 358 at page 232, when he wrote:

> "Is it intended that the provision '*** the singular number includes the plural ***' applies indiscriminately throughout the entire ordinance? No one could seriously urge such a literal construction, for the result would be ridiculous and chaotic. 'The

> thought behind a rule proclaims itself misread when the outcome of the reading is injustice or absurdity.' Finnegan v. Cohen, 177 Misc. 142, 30 N.Y.S. 2d 152, 154, affirmed 262 App. Div. 955, 30 N.Y.S. 2d 102, See also Surace v. Danna, 248 N.Y. 18, 21, 161 N.E. 315; In re Zinn's Estate, 185, Misc. 604, 57 N.Y.S. 2d 423; Goldner v. Savenue Realty Corp. 199 Misc. 561, 104 N.Y.S. 2d 298."

Applicants also cite Bon Air Estates vs. Incorporated Village of Suffern, 32 Ad 2nd, 921, in support of their proposition. This decision is not applicable because the Appellate Division Second Department in that case held a building permit was needed for each building in a garden apartment complex, and cited the definition of "lot" which is somewhat different from that in Section 86-1 of the Code only to show the ordinance was ambiguous and required construction.

Applicants also argue the Building Inspector's interpretation of "lot" is inconsistent with prior interpretations, citing a garden apartment complex on Middle Neck Road, St. Francis Hospital on Port Washington Boulevard, and a variance granted for a car rental office on Northern Boulevard as instances where there is more than one building on a lot. The garden apartment complex is a nonconforming use built in the Business District before the present provisions of the Zoning Ordinance were enacted. It could not now be constructed. St. Francis Hospital, until 1966, when rezoned into the General Municipal and Business Purposes District, was also a nonconforming use in a Residential

District, with each alteration or addition requiring a variance. Since 1966 all new construction was connected to existing buildings, except a convent which replaced an existing convent and, in any event, could be considered to be an accessory building. The variance recently granted for the rental car office on Northern Boulevard is not inconsistent with the interpretation of the word "lot" as applied to the present situation. In granting that variance this Board treated the building as being on a separate lot, the applicant in that case choosing the alternative rejected by applicants in this proceeding.

Section 7-712 Village Law authorizes this Board to review any

determination of the Building Inspector. Pursuant to that power this Board finds the Building Inspector's interpretation of "lot" to be correct.

The Building Inspector's determination that the area where the proposed building is to be constructed is a rear yard is also questioned by applicants. A "rear yard" is defined in Section 861 of the Code as follows:

> "A yard across the full width of the lot from the rear wall of the building to the rear line of the lot."

The Building Inspector found the rear yard extended from a line running across the plane of the rear of the center part of the existing building from the southeasterly corner towards the northeasterly corner of the lot, with the rear yard being triangular in

shape. That interpretation is in accord with the definition of "rear yard" in Section 86-1 of the Code and with the definition of "front yard" and "side yard" in that section. A "front yard" is defined as "A building to the front line of the lot." A "side yard" is defined "A yard extending from the front yard to the rear yard between the building and the adjacent side line of the lot."

Applicants assert that the yard abutting the Residential District is a side yard. They reason that because the subject premises abuts on three streets it is a corner lot. A "corner lot" is defined in Section 86-1 of the Code as "a parcel of land at the junction or intersection of and fronting on two or more streets." A

"front street" is defined in Section 86-1 of the Code as "The street upon which a particular lot fronts. A corner lot is deemed to front on the street upon which it has the smallest dimension. Since the yard with the smallest street frontage is on Ridge Drive East, that would be the front yard, Northern Boulevard would be the rear yard, and the area facing Ridge Drive West and that portion of the lot abutting the Residential District would be side yards. However, the building faces the intersection of Northern Boulevard and Ridge Drive West with Northern Boulevard as its address, and the rear of the building is on Ridge Drive East. If applicants' interpretation is followed, the front yard would be at the rear of the building and the

rear yard at the front. This would be directly contrary to the express definitions of "front yard" and "rear yard" in the Code. This Board finds the Building Inspector's interpretation of "rear yard" best resolves the incongruity, and, pursuant to Section 7-712 Village Law, affirms his finding. It is to be noted the difficulty with the various definitions only exists because of the unusual circumstances that the subject premises abuts on three streets and is a corner lot on two corners, a situation obviously not covered by those definitions.

Applicants have submitted no proof they would sustain economic injury if their application for a variance to erect a separate building on the same lot were denied. Moreover, their

explanation for a separate building - to avoid disturbing existing tenants - is, for the reasons heretofore set forth not persuasive. Finally, nothing prevents applicants from constructing an addition to the existing building except the requirement in the declaration of covenants that the Board of Trustees' consent first be obtained. The underlying reason for this application is to circumvent the declaration of covenants which provides expressly the consent of the Board of Trustees is needed for additions and alterations to existing buildings, but does not specifically state such consent must be obtained if a separate principal building is to be built. Whether it is the purpose or intent of the

declaration of covenants that the Board of Trustees' consent must be obtained if a separate principal building were to be built on the subject property is not an issue before this Board. If, however, the only reason for requesting a separate building is to circumvent the provisions of the declaration of covenants, that, in the opinion of the Board, does not, of itself, constitute the requisite practical difficulties which would support a variance of Section 86-1 of the Code. Accordingly, the application is denied.

Applicants' request for a variance to construct a building with a rear yard setback of less than 25 feet, as required by Section 86-12 (C) of the Code is also denied on the grounds

that applicants have not shown that they cannot construct the building 25 feet away from the Residential District. The subject premises are not so constructed that applicants are wedded to a building of the dimensions they propose. If there is to be construction between the existing building and the easterly sideline, there is more than ample room for a building having the same floor area as proposed by applicants, without the necessity of encroaching into the rear yard setback, and applicants have failed to show the existence of practical difficulties.

Dated: June 22, 1982

Thomas J. Walsh

H. Ash

Robert S. Caine

DECISION OF ALFRED E. RUNGE

I concur with the majority of the Board in denying a variance of Section 86-12(C) of the Code (rear yard setback). However, I disagree with the Building Inspector's interpretation of the definition of "lot" in Section 86-1 of the Code. I believe that definition does not prevent more than one principal building from being built on a lot and I would find the applicant is entitled to a building permit for a separate office building meeting all the other requirements of Chapter 86 of the Code.

June 22, 1982

Signed Alfred E. Runge

IN THE MATTER OF ALLISON AND
JULIA COLLARD 6/20/82

In reviewing the testimony given in this case, the various documents, and the merits of the remarks and wishes of the residents of the community, taken together with the wishes of the applicants to make use of their adjoining lot which is now vacant, the undersigned finds that the applicants have been denied the reasonable use of their property by the Board of Appeals, in not granting the requested variances and further, by the Board not properly defining the rear and side lot lines as requested by the applicants. The undersigned feels that the Building iIspector (under the explicit direction of the Village Attorney), has arbitrarily defined the side and rear lot lines of the present building in a deliberate attempt to frustrate the

applicants in obtaining a building permit, and that such lines contradict all reasonable and practical use as presently used in this village or in the art of surveying. Finally, the Village Attorney has arbitrarily imposed a hither-to unused interpretation of the village code requiring that only one building may be built on one lot, when the weight of the evidence given at the hearing showed that at least one (The Flower Hill Apartments) and possibly others (notably Saint Francis Hospital) have more than one building on one lot.

It is very apparent to the undersigned that the real issue in this case is not the side and rear yard determinations, nor the "one building on one lot" determination, but rather, whether or not the applicants are permitted to build a building on a piece of vacant

land which they own and whether or not that right is circumvented by a Covenant signed between the Village and the former owner of the building, Dr. Johnson. The Village Attorney has consistently maintained that the Covenant precludes any new construction: (a) "Any buildings, structures and improvements situated or to be situated thereon, will be erected, altered...", as well as (b), "any alterations to the present building", without the prior written consent of the Board of Trustees of the Village. The determination of (b) was upheld by the courts when the applicants brought an action against the Village when the Board of Trustees denied them permission to expand the present building. However, it is the undersigned's opinion that the restrictions of the Covenant do not apply to the adjoining

lot because the language of the Covenant is not only silent on this issue, but describes in great detail about what can, or cannot be done (without written permission of the Board), to the present building. or extensions thereof, but also eludes to the possibility of "building(s)" [other than the present building] being built in the future. If it were Dr. Johnson's and the Board's intention, not to have "any other buildings on this, or any other adjoining lot, built, extended, or modified, without the Board's written permission", it would have been a simple matter to include such a sentence and the Covenant could have been written with considerably less verbiage. At several times during the hearing and during the deliberation of the Board of Appeals, it was stated that: "Dr. Johnson had planned to

build a house for himself on the subject vacant lot and the Board of Trustees had known of this fact during the time that the negotiations on the Covenant were taking place between the Board and Dr. Johnson; and that although it was the intent of the Village Attorney [as told to this board] to limit any further building, such point was apparently never properly addressed in the covenant and was in direct contrast to Dr. Johnson's plan to build alongside [his house]. The Village had apparently "goofed" in negotiating and writing the Covenant if they planned to prohibit another building on the adjoining lot and was not embarking on a plan to impede the applicants by denying them a building permit by (in the undersigned's opinion) creating arbitrary and capricious "roadblocks" in the form of unreason-

able building department determinations made by the Village Building Inspector under the specific direction of the Village Attorney (whose opinions were not in agreement with the Building Inspector).

With regard to the rear yard line determination, the facts show that originally the Building Inspector considered the rear lot to be that which was behind the bulding and backing-up on Ridge Drive West; however, after direction by the Village Attorney to the contrary, he changed his opinion and redrew the rear line as a diagonal across one of the three rear faces of the present building and opposite no existing street what-soever, so as to make any future construction on that lot or any adjoining lot impossible under the present Village Building code. The side line

determination was based upon the rear line so that it further convoluted the setback requirements, thereby forcing the applicants to make the present application to the Board of Appeals.

After the original application was filed, the Village Attorney made a determination that a variance would also be required for "building more than one building on one lot" and added this section to the published "notice of meeting" although no such determination was made by the Village Building Inspector.

The records also show that the Village, under the direction of its former Mayor, Mr. Resnick, had instituted a change in the Zoning Code of the Village designed to change the Zone of the applicants vacant lot from "commercial" to "residential". Although the public hearing by the

Board of Trustees was held as scheduled, the Board of Trustees reserved decision on the matter, due, in part to the untimely death of Mr. Resnick. It is the undersigned's opinion that this action by the Board of Trustees was a clear case of "spot zoning" and further indicates the lengths to which the Village will go, to prevent the applicants from proceeding further with their desire to build on their vacant parcel. Why would the Trustees change the zoning to "residential" if the Covenant precluded any "new construction" in any case?

If the determination by the Village Attorney that "only one building on one lot may NOW be built in the Village" is upheld, it will set a dangerous precedent in zoning and building codes. The term "lot" is mostly a term used to define "TAX"

status whereas the term "plot" is more correctly used for the purpose of defining zoning limits. The essence of the applicants' plan is to combine three tax lots (there is also a small triangular lot of a few hundred square feet) into one plot.

The Board of Appeals is not empowered (nor is it being asked) to decide on the merits or restrictions of the covenant, as this has been deemed to be under the purview of the Board of Trustees; therefore, the comments made with regard to the covenant, are done so more for historical reasons, in order to give a chronology of events in this matter. It is the opinion of the undersigned that all matters regarding the covenant as to how it pertains (or affects) the adjoining vacant land owned by the applicants is a matter to be decided

outside the jurisdiction of this Board, unless so directed to the contrary by competent authority. Nevertheless, it is the undersigned's opinion that the covenant, and its different interpretations by both parties is the cause for this hearing, i.e.: the Village's deliberate and arbitrary obstruction to every request made by the applicants in applying for a Building Permit, because of alleged ambiguities in the covenant and the applicants' aggressive attempts to circumvent the covenant by first bringing an Article 78 action against the Village to have the covenant "thrown out" and after denial by the courts, secondly, designing a separate structure on an adjoining parcel of land, so that "modifying the existing structure would not be necessary."

It is the undersigned's opinion that, although the applicants original application (three-story above-ground building) was clearly an over-utilization of the property and that their action against the Village (the article 78 proceeding) could be considered as not in the public interest; the applicants should not be punished for attempting to seek redress of their grievances under due process of law, nor should they be unduly punished for asking for more than might logically be their right to have, as both of these rights are basic tenants of our Constitutional form of government, and neither the Board of Appeals nor the Board of Trustees has any right or authority to "enact punishment" because the applicants have exercised their Constitutional rights.

Testimony at the hearing indicated that applicants' original building had considerable opposition from neighboring residents, however, the applicants have revised their building plans to a point where such opposition from the neighbors has been reduced to acquiescence to the new proposed structure and some ambivalence to the fact that limited parking will be available from Ridge Drive East, although applicants have agreed to install an automatic gate limiting access to employees only, with key access. It is obvious that most of the applicants' neighbors would rather have the applicants maintain their vacant land as a pseudo "pocket park" as in the past, however, the applicants should not be denied their Constitutional rights to build a "reasonable structure", as long as the existing Covenant does not unconstitu-

tionally deny them the right to do so. Assuming the Covenant does not prohibit "construction of any kind" on the adjoining vacant parcel, then it is the undersigned's opinion that the Board of Appeals has unfairly denied the applicants' application for such construction in an arbitary and capricious manner. Also, the undersigned feels that the applicants have not received a proper hearing by the county Planning Commission, in that the County did not (for reasons unknown, since the latest application to the County had the Covenant attached thereto) have the conditions of the Covenant available so that their ruling about "not enough parking" might have been "adjusted" due to the fact that the number of tenants was to be limited; also, the applicants

latest poposal limiting the height of the building had not been submitted to the Commission.

June 22, 1982

Signed-John W. Walter

No. 84-2001

Office-Supreme Court, U.S.
FILED
JUL 26 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALLISON C. COLLARD and JULIA A. COLLARD,

Petitioners,

—against—

THE INCORPORATED VILLAGE OF FLOWER HILL; THE BOARD OF TRUSTEES; WILLIAM R. HOWE, BUILDING INSPECTOR; HERBERT ASH, THOMAS J. WALSH, ROBERT S. CAINE, ALFRED E. RUNGE, AND THE ZONING BOARD OF APPEALS OF THE INCORPORATED VILLAGE OF FLOWER HILL; AND JOHN M. FARRELL, JR., ESQ., VILLAGE ATTORNEY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION

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Counter Statement of Questions Presented for Review

1. Were the District Court and the Court of Appeals correct in dismissing the petitioners' second cause of action on the grounds of *res judicata* and collateral estoppel, where (a) the respondents moved for dismissal at the inception of the action, on the ground, *inter alia,* that this was a situation where the District Court should abstain from exercising jurisdiction because the pendency of the state-court Article 78 proceeding provided a forum for the petitioners' constitutional claims; (b) the petitioners were afforded the opportunity to fully litigate their constitutional claims in a state-court Article 78 proceeding grounded on the identical operative set of facts and challenging the same acts of the respondents which are challenged here; and (c) the petitioners did not preserve their purported constitutional claims for federal court adjudication?

2. Were the District Court and the Court of Appeals correct in determining that the petitioners' allegations of "bad faith" by the respondents in denying the petitioners' application for a zoning variance in order to *increase* the perceived economic benefit from petitioners' property failed to state an injury of constitutional magnitude?

3. Although neither the District Court nor the Court of Appeals determined it necessary to reach the issue, is dismissal nonetheless warranted (a) by the absolute legislative and/or judicial immunity of certain respondents, and (b) the qualified "good faith" immunity of the remaining respondents, together with the petitioners' failure to plead facts which would satisfy the "objective bad faith" test for sufficiency of the pleadings?

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No. 84-2001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALLISON C. COLLARD and JULIA A. COLLARD,

Petitioners,

—against—

THE INCORPORATED VILLAGE OF FLOWER HILL; THE BOARD OF TRUSTEES; WILLIAM R. HOWE, BUILDING INSPECTOR; HERBERT ASH, THOMAS J. WALSH, ROBERT S. CAINE, ALFRED E. RUNGE, AND THE ZONING BOARD OF APPEALS OF THE INCORPORATED VILLAGE OF FLOWER HILL; AND JOHN M. FARRELL, JR., ESQ., VILLAGE ATTORNEY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION

Statement of the Case.

This Court is the *ninth court,* over an almost six-year period, to be charged with ruling on the petitioners' claims against these respondents. This is also, concommitantly, the *ninth time* that the respondents have been called upon to bear the expense and effort of mounting a legal defense in court.

The claims advanced by petitioners in each court arise from only one factual circumstance: the petitioners' inability to obtain a zoning variance for additional office building construction on their property in the business district of the Village of Flower Hill.

If successful here, the petitioners will have successfully converted each federal court into a "court of zoning appeals" from every municipality within its jurisdiction.

The petitioners have *twice* wended their way through the entire three-tiered New York state system to the New York Court of Appeals (*See Collard* v. *Inc. Village of Flower Hill,* 75 A.D.2d 631 (2d Dep't 1980), *aff'd,* 52 N.Y. 2d 594 (1981); and *Collard, et al.* v. *Runge, et al.,* No. 14312/82 (Sup Ct., Nassau Co. Nov. 9, 1982), *aff'd,* No. 1183E (2d Dep't Jan. 9, 1984), *app. denied,* No. 490 (Ct. App. June 29, 1984)).

Having twice failed in the state courts, the petitioners sought to re-litigate identical claims in the United States District Court for the Eastern District of New York. The District Court, per Hon. Jacob Mishler, dismissed their complaint in a decision affirmed by the United States Court of Appeals for the Second Circuit, part of which petitioners now ask this Court to review. *Collard, et al.* v. *Inc. Village of Flower Hill, et al.,* CV 82-2143 (E.D.N.Y.

Oct. 30, 1984) (A-11 - A-43);* *aff'd,* Docket No. 84-7996 (2d Cir. 1985) (A-1 - A-4).

The dismissal of the instant action has thus not deprived the petitioners of their "day in court". They already had innumerable days in court, and so many "bites of the apple" that they may fairly be accused of judicial gluttony.

1. The complaint.

Peitioners' complaint** contains two causes of action pursuant to 42 U.S.C. §1983:

The *first cause* of action alleges that petitioners' requested permission to enlarge an existing office building which they owned (as they were required to do pursuant to a covenant entered into by their predecessors in title as a condition for an earlier zoning change). The respondent Board of Trustees of the Incorporated Village of Flower Hill denied their application without comment, and thus, according to the petitioners, breached their constitutional rights.

The *second* cause of action alleges that the petitioners subsequently applied for a building permit in order to build a second principal building on their property. Accord-

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* References are to pages of the petitioners' Appendix on this application.

** Subsequent to the submission of respondents' renewed motion to dismiss, the petitioners, *inter alia,* submitted a proposed "Amended Complaint." As Judge Mishler held, however, the Amended Complaint added nothing of substance to the petitioners' causes, was based on the same operative facts and thus could not change the result. (A - 42)

ing to petitioners, the Village Attorney, the Village Building Inspector and the Village Zoning Board of Appeals conspired together to deny their application, (a) by arbitrarily, capriciously, and unconstitutionally interpreting applicable provisions of the Village Code so as to require a variance for the granting of such a permit, and (b) by then refusing to grant such a variance.*

2. Respondents' motion to dismiss.

Over two years ago, the respondents moved in the District Court to dismiss petitioners' complaint. The grounds for this motion were:

1. The first cause of action was barred in its entirety by principles of *res judicata* and collateral estoppel. The petitioners previously challenged the Board of Trustees in a state court action alleging, *inter alia*, the unconstitutionality of the action of the Board in turning down without comment the petitioners' request to enlarge their building. Their claim received a full and fair adjudication on the merits. The result of the petitioners' state court action was a dismissal affirmed in an opinion by the New York State Court of Appeals."**

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* The petitioners' parcel of land was made up of three "tax lots", with a building covering *two* of the lots. The third "tax lot"—tax lot No. 12—had no building actually covering any part of it. The challenged interpretation of the Village Code was one holding that under the Code the plaintiff's parcel of land, although comprised of three "tax lots", consisted of a single "lot" for zoning purposes. Due to a Code zoning provision permitting only one principal building per lot, a second building—in addition to the existing use—could thus not be built on the property without a variance.

** The District Court's eventual dismissal of this first cause of action was not challenged on appeal in the Court of Appeals, and is not raised in the instant petition.

2. The second cause of action should be dismissed on two grounds: (1) as an act of abstention by the District Court in light of the fact that the petitioners had challenged the same governmental action in a concurrent state court Article 78 proceeding; and (2) because it failed to state a congnizable constitutional cause of action in light of the fact, *inter alia,* that no facts had been pled from which it could be inferred that there had been any constitutionally cognizable "taking" of property.

3. The entire complaint should in any case be dismissed (a) as to the individual Board of Trustees due to their absolute legislative immunity; (b) as to the Building Inspector and Zoning Board of Appeals due to their absolute judicial immunity; (c) as to the Village Attorney due to his role solely as an advisor and counselor; and (d) as to all the individual respondents due to (i) their at least qualified "good faith" immunity and (ii) the petitioners' failure to plead facts which would satisfy the "objective bad faith" test for sufficiency of pleadings.

3. The District Court's stay of this action.

The District Court, rather than at that juncture abstaining from exercising jurisdiction and addressing the merits of respondents' motion to dismiss, instead stayed all proceedings in the federal action. The District Court's rationale was that at the time of submission of respondents' motion, the state-court Article 78 proceeding which the petitioners had brought to challenge the same actions which they challenge in their second cause of action here, had been decided adversely to them. However, the state court decision had not yet received full appellate review in the state courts. Considerations of, *inter alia,* judicial economy, therefore indicated a stay.

4. Justice Harwood's state court Article 78 decision.

In petitioners' Article 78 proceeding, the Supreme Court of the State of New York determined that the Zoning Board's supposedly arbitrary, capricious and discriminatory interpretation of the applicable Village Code in fact possessed a "rational basis" and was based upon "substantial evidence". In fact, the state court noted that it was the petitioners' requested interpretation of the Village Code which possessed an element of irrationality. (Decision per Harwood, J., A-44).

The Board's interpretation was not merely sustained as rationally based and supported by substantial evidence, but Justice Harwood affirmatively noted that petitioners' proposed interpretation of the Code was "ironic" and "would result in chaos and absurdity" (A-61 - A-62). Finally, Justice Harwood held that the Zoning Board's refusal to grant a variance to petitioners did not amount to a "confiscation" of petitioners' property.

5. The respondents' renewed motion.

After appellate review of Justice Harwood's decision in the state-court Article 78 proceeding had been completed, and the decision twice affirmed, the respondents renewed their motion to dismiss in the District Court.

In the renewed motion, the respondents pointed out that as a result of the ripening of the issues in the Article 78 proceeding, dismissal of the petitioners' second cause of action was now *mandated* by principles of *res judicata* and collateral estoppel, rather than merely *indicated* as a discretionary act of abstention.

6. The District Court's dismissal of the complaint and the Court of Appeals' affirmance.

Judge Mishler agreed, and dismissed both of petitioners' causes of action, based upon (a) priniciples of *res judicata* and collateral estoppel, and (b) as an alternative and independent ground, failure to allege a cognizable constitutional injury. Judge Mishler thus did not reach the question of dismissal on the grounds of the various immunities.

The Court of Appeals affirmed Judge Mishler's decision, adopting his discussion of the *res judicata* grounds for the decision, and otherwise affirming "for substantially the reasons set forth in the opinion below." (A-4).

The petitioners here challenge only the *res judicata* grounds for dismissing their second cause of action.

Summary of Argument

In *Point I* below, we demonstrate that petitioners' District Court action was properly dismissed because petitioners fully litigated their case in state court without reserving any issues for federal court adjudication.

In *Point II* below, we demonstrate that even if, *arguendo,* Judge Mishler was incorrect in dismissing the second cause of action on grounds of *res judicata* and collateral estoppel, he was nevertheless correct in determining that the petitioners failed to allege a cognizable constitutional injury, which constitutes an independently sufficient alternative ground for dismissal. The Court of Appeals was thus correct in affirming on this ground as well. Certiorari to review solely the Court's *res judicata* grounds for dismissal would thus be unavailing since

affirmance would nonetheless be required on this independent, unchallenged ground.

In *Point III* below, we demonstrate that even were this Court to reject the other grounds of Judge Mishler's decision and the Court of Appeals' affirmance, the dismissal of the complaint would in any case be upheld on additional independent and alternative grounds not addressed by either Judge Mishler or the Court of Appeals, although briefed and argued in both courts. That is, the individual Board of Trustees possess absolute legislative immunity; the Building Inspector and Zoning Board of Appeals possess absolute judicial immunity; the Village Attorney acted in a role solely as an advisor and counselor; and all the individual respondents possess, at least, qualified "good faith" immunity. As to these latter individual respondents, the petitioners have failed to plead facts which would satisfy the "objective bad faith" test for sufficiency of pleadings.

For all the above reasons, this Court should issue an order which will terminate once and for all the petitioners' seemingly endless parade of lawsuits and appeals, by denying petitioners' application for a writ of certiorari.

POINT I

Petitioner's District Court action was properly dismissed on the ground that prior state-court adjudication precludes relitigation in federal court.

In the District Court and in the Court of Appeals, the petitioners contended that their federal constitutional claim could not have been raised in their state-court Article 78 proceeding, and that *res judicata* was thus inapplicable. That argument is not raised here. Apparently petitioners concede that under the applicable federal and New York law of claim preclusion, they are barred from relitigating their federal claim in federal court since they could have done so in their state-court proceedings.

Having thus taken the position that they could have, but did not, litigate their federal claim in their state-court proceeding, the petitioners now argue that their purported federal claim was "preserved" for adjudication in the District Court because the state court was "aware" of the federal action (Petition for Cert., p. 16). In support of this erroneous contention, petitioners rely upon one sentence of the Court's decision in *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1964), (Petition for Cert., p. 29).

In *England, supra,* this Court ruled that where a federal District Court has compelled a litigant to proceed in a state court, that litigant may elect to preserve his federal claim by informing the state court that he intends to return to the District Court for disposition of his federal claim. If, however, the litigant without reservation submits his entire case for decision by the state court, he will not be allowed to ignore an adverse state decision and relitigate the same issues all over again in the District

Court. This Court stated the rule in the following language:

> "[W]e see no reason why a party, after unreservedly litigating his federal claims in the state courts although not required to do so, should be allowed to ignore the adverse state decision and start all over again in the District Court . . . . *We now explicitly hold that if a party freely and without reservation, submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then*—whether or not he seeks direct review of the state decision in this Court—*he has elected to forego his right to return to the District Court.*
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> * * *
>
> "[*A*] *party may readily forestall any conclusion that he has elected not to return to the District Court. He may accomplish this by making on the state record, the 'reservation to the disposition of the entire case by the state courts'* that we referred to in Button. That is, he may inform the state courts that he is exposing his federal claims there only for the purpose of complying with Windsor, and that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions. Such an *explicit reservation is not indispensible;* the litigant is in no event to be denied his right to return to the District Court unless it clearly appears that he voluntarily did more than Windsor required and fully litigated his federal claims in the state courts. *When the reservation has been made, however, his right to return will in all events be preserved.*"

(*England, supra,* at 419-421; emphasis added)

Decisions rendered since this Court's ruling in *England* have made clear that in order to preserve a federal claim, a litigant must advise the state court of his intention to return to federal court. Indeed, in 1984, both this Court and the Court of Appeals for the Second Circuit held that a litigant who wishes to preserve a §1983 claim for federal adjudication must specifically so advise the state court. Thus, in *Migra* v. *Warren City School District Board of Education,* —— U.S. ——, 79 L.Ed.2d 56, this Court stated as follows:

> "In the event that a Section 1983 plaintiff's federal and state law claims are sufficiently interwined that the Federal Court abstains from passing on the federal claims without first allowing the state court to address the state law issues, the plaintiff can preserve his right to federal forum for his federal claims *by informing the state court of his intention to return to federal court on his federal claims, following litigation of his state claim in state court.*"

(*Migra,* 79 L.Ed.2d at 64, fn. 7; emphasis added)

In *West* v. *Village of Morrisonville,* 728 F.2d 130 (2d Cir. 1984), the Court of Appeals for the Second Circuit reaffirmed the necessity of an explicit reservation by the claimant:

> "Appellant is also free, of course, to let the state court determine all of the issues in this case if she so chooses. The choice is hers: if she wishes to preserve her federal issues (should they remain) for federal court determination, she should simply reserve the relevant federal issues in the state court proceedings."

(*West, supra,* at 135 fn. 5)

And, in *Heimbach* v. *Chu,* 744 F.2d 11 (2d Cir. 1984), the court held that a litigant who has raised a constitutional issue in a state action may not relitigate the issue in federal court. In so holding, the Court of Appeals disapproved "piece-meal attacks such as are being attempted here."

In the present litigation, petitioners concede that they did not inform the state court that they were reserving their federal claim for adjudication by the District Court. Instead, they contend (1) that "all agree" that petitioners did not litigate their federal claim in state court (Petition for Cert., p. 29); (2) that the District Court stayed petitioners' federal action "with the expectation that upon conclusion of the state court proceedings . . . plaintiffs' federal action [would be] allowed to proceed" (Petition for Cert., p. 15); and (3) that petitioners' federal claim was *automatically* preserved because the state court was "aware" of the federal action and Judge Mishler's stay (Petition for Cert., p. 16).

Each statement is inaccurate, as Judge Mishler recognized and so ruled.

a. Petitioners litigated their federal claim in state court.

The federal claim and the state claim are the same claim. In the state-court proceedings, petitioners attacked the Zoning Board of Appeals' interpretation of the term "lot" as used in Village Code §86-1, the Board's finding that under §86-12 there is a limitation of one principal building per lot, and the Board's denial of the petitioners' request for a variance, as a "confiscation" of their property. In the federal claim, petitioners attacked the Zoning Board of Appeals' interpretation of the term "lot" as used in Village Code §86-1, the Board's finding that under

§86-12 there is a limitation of one principal building per lot, and the Board's denial of their request for a variance, as part of a conspiracy to deprive petitioners of their constitutional right not to be deprived of property without due process. This claim was fully litigated in the state Article 78 proceeding. After upholding the Zoning Board's interpretation of the Village Code,, Justice Harwood considered and rejected petitioners' claim that the Zoning Board's refusal to grant a variance amounted to a "confiscation" of petitioners' property. In so ruling, Justice Harwood stated:

> "Petitioners are thus called upon to demonstrate that the property cannot reasonably be used or that petitioners will suffer significant economic injury, unless a variance on the ground of 'practical difficulties' is granted. (*National Merritt, Inc.* v. *Weist,* 41 N.Y.2d 438, 393 N.Y.S.2d 379.) . . . *While arguing that denial of the variance is tantamount to confiscation of lot No. 12, petitioners do not argue that they are denied reasonable economic benefit from the parcel as a whole, and they have submitted no plan or application for building on lot No. 12 as a separate lot.*" (A-63 - A-64).*

Justice Harwood's decision was affirmed by both the Appellate Division and the New York State Court of Appeals. Thus, the state court adjudicated all of petitioners' claims, leaving nothing for federal court adjudi-

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* By arguing that their property had been "confiscated" because it could not "reasonably be used" without the variance, the petitioners did expressly present to the state court the question—and the state court did expressly decide—whether the denial of the variance constituted an unconstitutional exercise of the state's power. *National Merritt, Inc. v. Weist, supra,* 41 N.Y.2d at 445.

cation. Judge Mishler recognized that fact when he noted in his decision that the petitioners' federal claim is no more than a rephrasing of the state court claim "in terms of constitutional violations." (A-30).*

b. There was no "expectation" that the federal action would go forward upon the conclusion of the state court proceedings.

The stay of a federal action pending a determination of a related state court action has been judicially described and approved as a procedure which can avoid wasteful and duplicative litigation and which might well result in the ultimate dismissal of the federal action:

> "[A] federal court is not precluded in the exercise of its discretion, from staying proceedings in the action before it, pending a decision by the state court with a view to avoiding wasteful duplication of judicial resources and having the benefit of the state court's views. [citations omitted]
>
> Indeed, the state court's decision might, under some circumstances, provide a defendant in the federal action with the defense of collateral estoppel [citation omitted]."

(*Giulini* v. *Blessing,* 654 F.2d 189, 193-94 (2d Cir. 1981); See also, *Colorado River Water Cons. Dist.* v. *U.S.,* 424 U.S. 800 (1976)).

There is no support for petitioners' statement that Judge Mishler stayed the action with the "expectation"

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* Indeed, petitioners neither describe their federal claim nor distinguish it from their state claim anywhere in their Petition for Certiorari.

that it would later proceed on the merits in District Court. In issuing the stay, Judge Mishler did not indicate whether he did or did not expect the case to later proceed in District Court. Rather, he stated that one reason for granting the stay was to avoid "wasteful duplication of judicial resources," thus recognizing the possibility that the state court proceeding might prove to be dispositive of the petitioners' federal claim. Judge Mishler concluded his decision by stating that ". . . we do not *now* address defendants' motion to dismiss. We stay this action for all purposes, pending a final judgment in the state courts," thus indicating that, even after the state court proceedings were concluded, the respondents' motion to dismiss would be addressed before the case would be allowed to proceed any further. Thus, far from indicating that he expected that the petitioners' federal action would later go forward on its merits as petitioners claim, Judge Mishler clearly indicated that the federal claim might well be dismissed.

c. Petitioners failed to reserve their federal claim for District Court adjudication.

In spite of having been so forewarned, petitioners glibly proceeded to litigate their claims fully in the state-court proceeding without identifying or distinguishing the federal claim and without reserving any issues for federal court adjudication. Petitioners neither explicitly nor implicitly reserved any issue for the District Court. To the contrary, they fully and vigorously litigated their claim in the state court proceeding. Hence, their present contention that everyone simply was "aware" that certain issues were reserved for the District Court's determination because everyone knew that Judge Mishler stayed the federal action "with the expectation" that the action would

later proceed in the District Court is wholly illogical. Petitioners have not and cannot support their statement that the state court and the defendants were "aware" of petitioners' unspoken election to reserve certain issues. Nothing in the record indicates such an awareness. Quite to the contrary, the record clearly demonstrates that the state court heard and determined all of petitioners' claims. There was nothing left for the federal court to adjudicate.

In sum, petitioners' constitutional claim could have been and was presented to and determined by the state court in petitioners' Article 78 proceeding. The claim was not effectively preserved. The District Court was therefore precluded from later hearing petitioners' claim and properly dismissed it.

POINT II

Petitioners' failure to state a §1983 claim upon which relief can be granted was an independently sufficient ground for dismissal.

This petition requests review of the dismissal of a complaint instituted by petitioners who claim to be aggrieved by the failure of a municipality to grant them a zoning variance. Even if, *arguendo,* the dismissal on *res judicata* grounds is deemed improper, a question is presented as to whether the District Court's alternative ground for dismissal (that the petitioners failed to state a §1983 claim) is an independently sufficient ground for dismissal.

Judge Mishler, in the District Court, having discussed the bases for dismissal of the petitioners' complaint pursuant to principles of *res judicata* and collateral estoppel, went on to hold that:

> "Alternatively, plaintiff had failed to state a §1983 claim upon which relief can be granted and the claim should therefore be dismissed under Fed.R. Civ.P. 12(b)(6)." (A-35)

The Court of Appeals affirmed "for substantially the reasons set forth in the opinion below . . . ." The petitioners do *not* here request review of this alternative ground for dismissal, but the same would of necessity have to be reviewed by this Court if *certiorari* is granted.

In the District Court, Judge Mishler initially noted that the procedural due process claim advanced with respect to petitioners' first cause of action (and not pressed by petitioners here or in the Court of Appeals) was "frivolous" (A-35). Judge Mishler then went on to demonstrate that the petitioners did not allege "destruction" of the value of their property (A-39). They claimed a refusal to grant variances which would *increase* the value of their property (A-39), or which would, at worst, somewhat impair the property's value (A-39).

Judge Mishler ruled that "[t]he constitution does not protect a property owner's right to make more money than the zoning regulations permit, or a right to a fair market value of property at its highest and best use [citing *Penn Central Transportation Co.* v. *City of N.Y.*, 438 U.S. 104 (1978) and *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962)" (A-40), and that the petitioners thus failed to state a cause of action. He concluded as follows:

> "Recently, the Second Circuit Court of Appeals in *Park Avenue Tower Associates* v. *City of New York*, No. 84-7128 (Oct. 12, 1984), in affirming a grant of summary judgment dismissing the complaint, stated that a 'legion of cases . . . . have upheld regulations which merely diminished the value of commercial property.' Slip op. 6643.

> The plaintiffs in the instant case do not complain of an ordinance that reduces the value of their property, but complain that the Village of Flower Hill refuses to grant their request under existing regulations that would have the effect, if granted, of increasing the value of their property. I find, however, regardless of this difference, that plaintiffs' substantive due process claim is controlled by the foregoing decisions and should be dismissed under Fed.R.Civ.P. 12(b)(6)." (A-39 - A42, footnote omitted.)

The Court of Appeals affirmed stating:

> "We have carefully considered the Collards' numerous arguments on appeal, and find them to be without merit. Accordingly, for substantially the reasons set forth in the opinion below, the judgment of the district court is affirmed." (A-4).

Thus, even were the decisions of the Court of Appeals and the District Court reviewed and found to be erroneous on *res judicata* grounds, they should nonetheless be affirmed on the alternative ground that the petitioners failed to state a cause of action.

Justice Harwood, in his decision on the petitioners' state-court Article 78 proceeding (a decision enforceable via collateral estoppel even if, *arguendo,* the §1983 action were not precluded in its entirety by *res judicata*), noted that the petitioners had failed to demonstrate either any "significantly economic injury" or that the property "cannot reasonably be used" (A-63). Justice Harwood found the interpretation of the Village Code by the Village Zoning Board to be "rationally based" and "supported by substantial evidence" (A-65). The failure to grant a variance, then, simply left the property in its existing state. Peti-

tioners have no constitutional right, at least vis-a-vis the government, to achieve the most beneficial use of their property.

Judge Mishler thus correctly determined that the petitioners failed to state a cause of action under §1983, and correctly dismissed their complaint.

POINT III

The complaint was properly dismissed for the additional reason that each of the respondents has absolute or qualified immunity from such claims.

Having dismissed petitioners' complaint on the grounds of (a) *res judicata* and collateral estoppel and (b) failure to allege a cognizable constitutional injury, Judge Mishler found it unnecessary to reach the issue of the various immunities possessed by each of the respondents. The Court of Appeals also found it unnecessary to reach this issue. However, we here demonstrate that these immunities present yet another independently sufficient basis for dismissing petitioners' complaint.

Pursuant to the well-settled rules that federal, state and local legislators, and persons acting in a legislative, judicial or quasi-judicial capacity, have absolute (unqualified) immunity from claims under §1983, the complaint must be dismissed against the members of the Board of Trustees and the Zoning Board of Appeals.*

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* Although not entitled to absolute immunity, the complaint against the Village Attorney should nevertheless be dismissed. The role of the Village Attorney is merely that of an advisor and legal counselor to the various governmental bodies and officials of the Village.

Both this Court and the Second Circuit Court of Appeals have held that legislators are entitled to absolute immunity, *Tenny* v. *Brandhove,* 341 U.S. 367, 95 L.Ed. 1019 (1951); *Star Distributors Ltd.* v. *Marino,* 613 F.2d 4, 9 (2d Cir. 1980). There is likewise no question but that absolute immunity is to be accorded to local legislators, local public officials acting in that capacity, and to members of a village board of trustees, *Lake County Estates, Inc.* v. *Tahoe Regional Planning Agency,* 440 U.S. 391, 59 L. Ed. 2d 401 (1979); *Searingtown Corporation* v. *Incorporated Village of North Hills,* No. CV-80-2670, slip opinion (E.D.N.Y. Nov. 6, 1981).

Zoning is a legislative power which the state has elected to delegate to the cities, villages and towns. 12 N.Y. Jur., Buildings §§79, 82, 382, 383. *See Collard* v. *Incorporated Village of Flower Hill, supra,* 52 N.Y. 2d at 601; *McDonough* v. *Apton,* 48 A.D. 2d 195, 198 (4th Dep't 1975); *Robert E. Kurzius, Inc.* v. *Incorporated Village of Upper Brookville,* 51 N.Y. 2d 338, 344 (1980), *cert. denied,* 450 U.S. 1042 (1981).

The Board of Trustees, in the action before this Court, is a legislative body, and the members thereof acted in a legislative capacity with respect to their alleged acts complained of by petitioners.* *See, Goldberg* v. *Village of Spring Valley,* 538 F. Supp. 646 (S.D.N.Y. 1982).

Since the members of the Board of Trustees acted in a legislative capacity in connection with the actions about which the petitioners complain, they have absolute immunity from claims under §1983 for damages as well as declaratory and injunctive relief. The complaint thereofre fails to state a claim upon which relief can be granted against these respondents and must be dismissed.

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* The mayor and trustees are elected officers. New York Village Law § 3 - 301 (3).

The members of the Zoning Board of Appeals ("ZBA") are absolutely immune pursuant to the equally well-settled rule that persons acting in a judicial or quasi-judicial capacity have absolute immunity from claims for damages under §1983, *Pierson* v. *Ray,* 386 U.S. 547, 18 L.Ed.2d 288 (1967); *Stump* v. *Sparkman,* 435 U.S. 349, 55 L.Ed.2d 331 (1978); *Heimbach* v. *Village of Lyons,* 597 F.2d 344 (2d Cir. 1979).

Recent decisions have broadened the ambit of those persons found to act in a judicial or quasi-judicial capacity. This trend is based on a recognized need to permit decisions of a judicial or quasi-judicial nature to be made on a basis of independence, free from fear of retribution through legal action. Absolute immunity has been accorded to parole board members, *Sellars* v. *Procumir,* 641 F.2d 1295 (9th Cir. 1981); to prosecuting attorneys, *Imbler* v. *Pachtman,* 424 U.S. 409, 47 L.Ed.2d 128 (1976); to court clerks, *Shipp* v. *Todd,* 568 F.2d 133 (9th Cir. 1978); to county auditors and county treasurers, *Harnow* v. *Supreme Court of Arizona,* 329 F.2d 154 (9th Cir. 1964); and to federal hearing examiners, administrative law judges, and certain agency officials, *Butz* v. *Economou,* 438 U.S. 478, 57 L.Ed.2d 895 (1978).

The role and functions of the ZBA are established by the New York Village Law §7-712 and Article V of Chapter 86 of the Village Code. Under the Village Law, the ZBA ". . . shall hear and decide appeals" from determinations made by administrative officials charged with the enforcement of ordinances and local laws. The chairman of the ZBA may reverse or affirm, wholly or partly, or may modify the determination appealed from. The ZBA's decisions must be filed with the Village Clerk and are subject to review by the New York Supreme Court by way of an application under Article 78 of the New York Civil Practice Law and Rules ("CPLR").

The role of the ZBA, and the members thereof in rendering the decisions made in connection with the matters complained of by the petitioners, were certainly judicial or quasi-judicial in nature. Therefore, under established precedent, the four members of the ZBA who are respondents here are absolutely immune from the damages demanded in this action.*

Additionally, the individual members of the Board of Trustees, the individual members of the ZBA, and Messrs. Howe and Farrell are entitled to a qualified, good faith immunity.

Qualified immunity has been accorded to public officials at all levels of government, including members of school boards, *Wood* v. *Strickland,* 420 U.S. 308, 43 L.Ed.2d 214 (1975); prison officials, *Procanier* v. *Navarette,* 434 U.S. 555, 55 L.Ed.2d 24 (1978); state hospital superintendents, *O'Connor* v. *Donaldson,* 422 U.S. 563, 45 L.Ed.2d 396 (1978); the mayor, deputy mayor, building inspector and other officials of a village, *Laverne* v. *Corning,* 522 F.2d 1144 (2d Cir. 1975); a deputy sheriff, *Tucker* v. *Maher,* 497 F.2d 1309, 1313 (2d Cir. 1974); and prosecutors, *Imbler* v. *Pachtman,* 424 U.S. 409, 47 L.Ed.2d 128 (1976).

In *Harlow* v. *Fitzgerald,* 457 U.S. 800, 73 L.Ed. 2d 396 (1982), this Court eliminated the subjective part of the test for good faith:

> "*The subjective element of good faith defense frequently has proved incompatible with our admonition in Butz that insubstantial claims should not*

---

* With regard to Respondent Howe, the Building Inspector, it has been held that the refusal by a building inspector to issue a building permit was a discretionary act, *quasi-judicial* in character, and, therefore, he was shielded from liability. *Rottkemp v. Young,* 21 A.D.2d 373 (2nd Dep't 1964), *aff'd* 15 N.Y.2d 831 (1965).

> *proceed to trial.* Rule 56 of the Federal Rules of Civil Procedure provides that disputed questions of fact ordinarily may not be decided on motions for summary judgment. And an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury.
>
> * * *
>
> [W]e concluded today that *bare allegations of malice* should not suffice to subject government officials either to the costs of trial or to the burdens of broad reaching discovery. *We therefore hold that government officials performing (discretionary) functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."*

Id. at 815-818, 73 L.Ed.2d at 409-410 (emphasis added).*

Because the complaint in this action fails to allege a lack of good faith in any respect, much less malice, and fails to allege that the individual respondents acted beyond the scope of their duties, it must be dismissed as to the members of the Board of Trustees, members of the ZBA, Village Attorney and Building Inspector, all of whom were named as defendants in their official capacities.

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* Although *Harlow* involved federal officials, the good faith test *of Harlow* is the same for state and local officials under § 1983. *Harlow v.Fitzgerald,* 457 U.S. 800, 73 L.Ed2d 396 (1982).

CONCLUSION

The petition for writ of certiorari should be denied in all respects.

Dated: Mineola, New York
July 22, 1985

Respectfully submitted,

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Supreme Court, U.S.
FILED
AUG 13 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALLISON C. COLLARD and JULIA A. COLLARD,

Petitioners,

– against –

THE INCORPORATED VILLAGE OF FLOWER HILL; THE BOARD OF TRUSTEES; WILLIAM R. HOWE, BUILDING INSPECTOR; HERBERT ASH, THOMAS J. WALSH, ROBERT S. CAINE, ALFRED E. RUNGE, and THE ZONING BOARD OF APPEALS OF THE INCORPORATED VILLAGE OF FLOWER HILL; and JOHN M. FARRELL, JR., ESQ., VILLAGE ATTORNEY,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF FOR GRANTING THE WRIT OF CERTIORARI

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I. INTRODUCTION

The Petition for a writ of certiorari represents Petitioners' most sincere effort not only to obtain a fair adjudication of their civil rights claim against parties whom they allege have conspired to deprive them of their constitutional rights, but also to present to this Court, in the clearest fashion possible, an important and timely question concerning the relationship between the doctrines of federal abstention and res judicata. This effort has evoked from Respondents, a governmental entity and its officials, a Brief in Opposition which is thoroughly inaccurate, disingenuous, irresponsible, and an insult to this Court. It misrepresents the facts of this case and the holdings of the courts below. It attempts to distract the Court from focusing on the important issue raised herein by seeking

to ridicule and deride Petitioners. It raises sham, baseless arguments as purported alternative bases for this Court's declining to consider the important issue presented by the Petition. And, lastly, when Respondents do make some attempt to confront the legal issue presented by the Petition, the sole answer they can muster to counter our argument that the courts below ignored the teaching of England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964), that, in the face of an application of the abstention doctrine, the reservation of federal claims for federal adjudication need not be explicit, is the thoroughly incredible argument, never suggested below, that this aspect of England was overruled by a footnote in a case, Migra v. Warren City School District Board of Education, 465 U.S. ____, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984), which did not involve application

of the abstention doctrine and which had nothing to do with the important legal question presented herein.

In this Reply, we respond only to the more significant new arguments and factual misstatements presented by Respondents in their Brief. However, we would point out that our failure here to respond in every particular to Respondents' Brief should not be taken as a concession concerning the accuracy or fairness or reasonableness of anything stated therein.

II. ARGUMENT

1. Migra v. Warren City School District Board of Education, 465 U.S. ____ (1984), Did Not Overrule This Court's Holding in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964), That, in the Face of an Application of the Abstention Doctrine, The Petitioners' Reservation of Their Federal Claim for Federal Adjudication Need Not Be Explicit

At page 11 of their Brief, Respondents make the remarkable argument that the

quite clear teaching of England that an explicit reservation is not necessary to reserve a federal claim in the face of abstention, England, supra at 421, has been overruled by a footnote in Migra, supra, 104 S.Ct. at 898, n. 7, which is in no way inconsistent with anything in England and which had absolutely nothing to do with the facts before the Court or the issue presented in Migra. The footnote relied upon reads:

> "In the event that a §1983 plaintiff's federal and state law claims are sufficiently intertwined that the federal court abstains from passing on the federal claims without first allowing the state court to address the state law issues, the plaintiff can preserve his right to a federal forum for his federal claims by informing the state court of his intention to return to federal court on his federal claims following litigation of his state claims in state court. See, e.g., England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964)." (Emphasis added)

This is consistent with England's teaching that a plaintiff can preserve his federal claim for federal adjudication by such an explicit reservation. England, 375 U.S. at 421. It is not inconsistent with England's additional teaching that, while such an explicit reservation will "in all events" suffice, it "is not indispensible." Id. This issue, i.e., what will suffice to preserve a federal claim for federal adjudication in the face of abstention, was not presented in Migra, and plainly this footnote in Migra cannot seriously be understood by Respondents as any sort of considered reevaluation and rejection by the Migra court of England's very thoughtful teaching that "an explicit reservation is not indispensible." 375 U.S. at 421.

Moreover, this aspect of England makes perfectly good sense. As England

makes plain, it is not the purpose of the abstention doctrine to deprive the plaintiff of a federal forum for his federal claim. The election whether to litigate his federal claim in state or federal court is the plaintiff's. Here, the function of an explicit reservation on the state court record is merely to "forestall any conclusion that he has elected not to return to the District Court." England, 375 U.S. at 421. It is not simply some sort of formalistic ritual -- and, indeed, England does not even state how or in what specific manner such an explicit reservation should be made. Accordingly, where it is clear that the Plaintiffs did not present their federal claim to the state courts and all parties concerned were aware of the outstanding, unresolved federal claim with every expectation of resuming the federal action, as was the case here, it serves

no legitimate purpose in terms of either abstention or res judicata considerations to hold that a plaintiff in this situation should be deprived of a federal forum for the adjudication of his federal claim.

Of course, in retrospect, it is apparent that Petitioners would have been better advised to have gone through the otherwise purposeless act of placing on the record of the Article 78 proceedings an explicit statement of their intent to return to the district court and further pursuing their still pending civil rights claim in the federal forum. Had they done that there would be no question now, we submit, but that they are entitled to a federal adjudication of their claimed deprivation of their civil rights. However, as Petitioners pointed out to the courts below, they did not believe their entirely distinct civil rights

claim, which sought, inter alia, damages and named additional defendants, was a claim which could be adjudicated in that proceeding, which was in the nature of a special proceeding rather than a plenary action. In any event, under England, it was clear that such an explicit reservation was not required.

Furthermore, with the district court having declined to dismiss Petitioners' civil rights claim, but instead having merely stayed the prosecution of that claim and retaining jurisdiction, it was entirely appropriate for Petitioners and Respondents to expect, as they did, that at the conclusion of the state court proceedings, they could return to the federal court for an adjudication of their civil rights claim.

Respondents present no evidence to show that their view of Migra having

overruled England has ever been followed by any court. West v. Village of Morrisonville, 728 F.2d 130 (2d Cir. 1984), which Respondents claim (p. 11), "reaffirmed the necessity of an explicit reservation" said simply that an express reservation was possible. Respondents cite Heimbach v. Chu, 744 F.2d 11 (2d Cir. 1984), for the position that "a litigant who has raised a constitutional issue in a state action may not relitigate the issue in federal court." Here, Petitioners never litigated their federal claim in any court, as Respondents attempt to deceive this Court into believing. Thus, Heimbach is totally inapplicable.

Hence, everything that Petitioners did was reasonable and consistent with England. Now, however, it is urged that Migra, decided after the district court's stay order, overruled England and thereby

puts Petitioners out of court for failing to do what England specifically declared was not required. We submit that Migra was not intended to overrule this aspect of England, which is analytically sound and entirely fair and practical. Even if footnote 7 of Migra was intended to have that effect, it is most unjust that this so veiled and unclear "holding" should be given retroactive application to Petitioners.

We would urge that Migra in no way undermines this aspect of England -- and the grant of the writ and a summary reversal in this case would suffice to make this clear to litigants and lower courts. However, should this Court find that this aspect of England should be reconsidered, we submit this argues equally forcefully for the granting of the writ to consider: (1) whether this part of England's holding should be

overruled and (2) assuming it should be overruled, whether such a ruling should be applied retroactively. In any event, even under Respondents' own so radical view of the continued force of this aspect of England, this is plainly a case presenting issues sufficiently important to warrant the granting of the writ of certiorari.

2. Plaintiffs Did Not Litigate Their Civil Rights Claim in State Court

Undoubtedly, recognizing the absurdity of their argument that Migra overruled so much of England as holds that in the face of abstention the reservation of federal claims for federal adjudication must be explicit, Respondents falsely claim (Opposition Brief, pp. 12-13, 15-16) that Petitioners actually litigated the civil rights claims set forth in the second cause of action in their federal Complaint

in state court. This is patent nonsense, squarely rebutted by the decisions herein of both the district court (A-11-43) and the Court of Appeals (A1-4), both of which are premised on the clear assumption -- which is why each found Migra controlling -- that this is a claim that could have been but was not raised in the state court Article 78 proceedings, as well as by the record in the state court proceedings, wherein not only were the parties not identical to those in this federal suit, but also it is clear from the state court's decision (A44-65) that nothing similiar to Petitioners' claim of a conspiracy to deprive them of their civil rights was there tendered for adjudication. Indeed, it is supremely ironic that on the very date on which Respondents filed their Brief in Opposition in this Court, July 22, 1985, the district court, in a related proceeding in which the Re-

spondents are seeking an award of attorneys fees from Petitioners pursuant to 42 U.S.C. §1988, made it crystal clear that it was of the view that Petitioners did not litigate their civil rights claim in state court. See Memorandum of Decision and Order, 82 Civ. 2143, E.D.N.Y., July 22, 1985 (Mishler, J.), at pp. 3 and 5, noting that Allen v. McCurry, 449 U.S. 90, 97 n. 10 (1980), "left open" the question of the preclusive effect of a state court judgment where a §1983 plaintiff could have but did not actually raise the §1983 issue in the state proceedings, and explaining its decision not to grant attorneys' fees here by pointing out that a "reasonably objective litigant," such as Petitioners, "would reasonably believe, before the Migra decision was issued, that he or she was not precluded from litigating issues which were not actually litigated in the prior state action."

(emphasis supplied).

The second cause of action alleged in Petitioners' Complaint and Amended Complaint alleges a conspiracy by these Respondents, for improper and unlawful purposes, to deprive Petitioners of their civil rights. That claim has never been adjudicated in any court, state or federal. For Respondents to suggest in their Brief that in fact this claim was "fully litigated" is simply dishonest. Respondents know this is not so. For Respondents to make this sort of argument in this Court simply cheapens the discourse to which this Court and the parties who appear before it are entitled. What has occurred heretofore in this case in the courts below represents, we believe, simply a good faith omission on the part of those courts to consider or fully appreciate the application here of what this Court actually held in England.

Respondents' perhaps understandably desire to retain the victory they have thus far obtained in this matter does not, and cannot, justify their attempt to mislead this Court concerning a critical fact relevant to this Court's decision on this Petition.

3. Petitioners Asserted a Claim Under 42 U.S.C. §1983, Argued the Dismissal of Their Claim Under Fed.R.Civ.P.12(b)(6) Before the Court of Appeals and this Court, Nevertheless the Court of Appeals Never Ruled on this Issue

Again, we must charge Respondents with attempting to mislead this Court. At Point II in their Brief (pp. 16-19), Respondents argue that Petitioners failed to state a claim under §1983, that the Court of Appeals affirmed the dismissal of Petitioners' claim on this ground and that this issue has not been presented by Petitioners to this Court.

It would be a mistake to believe that Petitioners brought their federal civil

rights claim solely because they were denied a building permit or because they challenge, per se, the right of a municipality to constitutionally enact zoning regulations. Petitioners do not challenge the zoning law of the Village of Flower Hill "on its face," but, rather, "as applied" to Petitioners. Petitioners' Statement of Facts to the courts below and this Court (Petitioners' Main Brief, pp. 8-11), assert, inter alia, that following the refusal of an initial building plan submitted by Petitioners to the Village, Petitioners revised their plans to conform to the Village Zoning Code. In response to this second plan, the Village redefined the law and its applicability to Petitioners by effectively "rotating" what was considered the rear and side yards of Petitioners' property from their traditional boundary so as to allow the Village to hold the revised building plan

as again nonconforming.

In their Amended Complaint that was before both the District Court and the Court of Appeals, Petitioners alleged, inter alia, that:

> "...with deliberate malice toward Plaintiffs [the Village Attorney, Defendant Farrell] instructed the building inspector to disregard the traditional rear and side yards of Plaintiffs' property with a deliberate intent to discriminate against Plaintiffs and with a scheme to deny Plaintiffs equal protection under the law redefined the Village Code, redrew the rear and side yard boundaries of Plaintiffs' property, as diagonal lines across Plaintiff's [sic] property, and in collusion with Defendant Building Inspector HOWE, instructed him to advise Plaintiffs that their proposed building violated Section 86-12, of the Village Code. [reference to exhibit of complaint] Such oppressive methods by HOWE and FARRELL were deliberately designed to force Plaintiffs to have to seek a variance for their second proposed building plan since the second proposed building plan of Plaintiffs as realized by Defendants FARRELL and HOWE were not prohibited by the Declaration of Covenants on the land."

Such allegations clearly present a cognizable claim under the federal civil rights statutes upon which relief can be granted, Burt v. City of New York, 156 F.2d 791 (2d Cir. 1946); Riccobono v. Whitpain Tp., 497 F.Supp. 1364 (E.D.Pa. 1980). These facts having been presented to each level of the federal judiciary, it is error on the part of Respondents to assert that dismissal of Petitioners' federal claims under Rule 12(b)(6) has gone unchallenged.

Under no fair reading of the opinion of the Court of Appeals in this case can it be said that the Court held, in the alternative, that Petitioners' Complaint should be dismissed for failure to state a claim upon which relief can be granted.

4. Respondents Lack Any Immunity From Federal Civil Rights Laws For Violation of Petitioners' Constitutionally-Guaranteed Rights

Respondents' various claims of immuni-

ty must be rejected. First, these are affirmative defenses which must be pleaded. Here, there has never been an answer filed and, thus, these claims are not properly before the Court. Second, the claims of absolute privilege are without any basis in law and, thus, do not bar equitable relief and the award of costs against Respondents. Third, all that any of the Respondents can claim, and this is most assuredly true with respect to the Village Attorney and the Building Inspector, is a qualified privilege. It is obvious that this defense presents issues which should not in the first instance be decided by this Court -- and indeed cannot be decided on this record.

Moreover, the Court stated in Harlow v. Fitzgerald, 457 U.S. 800 (1982) that public officials are not shielded from liability when their conduct violates "clearly established statutory or

constitutional rights." Id. at 815-18.

Petitioners' Amended Complaint alleges bad faith, acts of malice, etc. that may be deemed beyond the scope of Respondents' duties. Their arguments of good faith are baseless in view of the allegations of bad faith presented in Petitioners' Amended Complaint. Such bad faith is a bar to any claim of qualified immunity.

III. CONCLUSION

Accordingly, the Petition for a Writ of Certiorari should be granted.

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